93-950

Supreme Court, U.S.
FILED
NOV 1 1993
OFFICE OF THE CLERK

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM EUGENE RUTLEDGE,

Petitioner,

v.

ROBERT B. REICH, SECRETARY OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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133 pp

QUESTIONS PRESENTED FOR REVIEW

1. Where the District Court following Petitioner's criminal conviction imposed a monetary judgment under the Victim Restitution Act, which fully compensated the Government, is a second monetary award in a Government civil action barred by the Double Jeopardy Clause as interpreted by United States v. Halper where such judgment is merely duplicative of the first judgment and collection of either judgment gives rise to a dollar for dollar credit against the other?

2. Where upon Petitioner's criminal conviction, the operation of 29 U.S.C.§ 1111 automatically imposed on Petitioner a 13 year debarment from serving as a fiduciary or service provider to an ERISA plan, is the imposition in a subsequent civil action of an injunction permanently debarring the Petitioner from serving in such capacities barred by the Double Jeopardy Clause as interpreted by United States v. Halper where the Government fails to allege or prove any circumstances requiring a greater period of debarrment to serve any alleged Government interest?

3. Does the "particularized inquiry" required by United States v. Halper in Double Jeopardy Clause multiple punishments analysis apply to successive prosecutions analysis under the Double Jeopardy Clause?

4. Does the Labor Department lose its standing under 29 U.S.C. § 1132 to bring an action against a fiduciary for the benefit of an ERISA plan when the Pension

Benefit Guaranty Corporation is appointed statutory trustee of the plan under 29 U.S.C. § § 1342(d)(1)(B)(ii) and (iv)?

5. Is the Labor Department subject to a compulsory counterclaim based on the violation by the agency of the Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. § § 1961, et. seq., where the recovery sought in the compulsory counterclaim is limited to the amount of any recovery by the Labor Department against the counterclaimant?

6. Does the Right To Financial Privacy Act, 12 U.S.C. § § 3401, et. seq., provide for injunctive relief prohibiting the Government from using information and documents obtained in violation of the Act?

LIST OF PARTIES

William Eugene Rutledge ("Petitioner").

Robert B. Reich, Secretary of Labor ("Labor Department").[1]

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[1]There are no other parties to this action since the District Court has dismissed all parties and claims by separate orders which have not been contested or appealed.

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OPINIONS BELOW

The opinion of the District Court is reproduced in Appendix III. The opinion of the Eleventh Circuit Court Of Appeals affirming, without opinion, the District Court is reproduced in Appendix II. The opinion of the Eleventh Circuit Court of Appeals dated September 8, 1993, denying the Petitioner's application for rehearing and rehearing en banc is reproduced as Appendix I.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. §§ 3401, *et. seq.*; 18 U.S.C. §§ 664, 1961, *et. seq.*, 3663; 29 U.S.C. §§ 1001, *et. seq.* , 1104, 1106, 1109, 1111, 1132, 1342, 1301-1461, 1307, 1321-1322, 1342, 1361; 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Proceedings In The District Court

The ERISA pension plans at issue in this case are the

Lattimer-Stevens Salaried Plan and the Lattimer-Stevens Hourly Plans ("Plans"). The Plans were totally employer financed and were defined benefit plans which, prior to their termination, covered the salaried and hourly employees of the Lattimer-Stevens Company. Petitioner was the trustee of the Plans from August of 1984 to January of 1990. Stewart R. Dudley, a Birmingham, Alabama lawyer and certified public accountant, was the attorney, accountant, and investment advisor of the Plans at all relevant time, and personally controlled and directed all use of the assets of the Plans at all relevant times under delegation from the Petitioner. See Appendix IV.[1] The Plans were at all relevant times subject to the provisions of the Employee Retirement Income Act of 1974 (ERISA), 29 U.S.C. §§ 1001, et seq.

The Labor Department filed this action on January 17, 1991, in a five count complaint charging the following defendants with misuse of the Plan's assets in violation of

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[1]The Plans authorized the trustee to delegate authority to control the assets of the Plans to an investment advisor without liability for the acts of the investment advisor. Such a liability free delegation is also authorized by 29 U.S.C. § 1105(d).

ERISA - the Petitioner, a former trustee of the Plans, the Lattimer-Stevens Company, the Plans' sponsor, and the Rutledge Industrial Corporation, the parent of Lattimer-Stevens, and the Plans. All five of these original counts were subsequently abandoned by the Labor Department and are not a part of the case.[2]

On May 8, 1991, the District Court consolidated for pretrial preparation the cases of Rutledge, et al. v Dudley, et al, Civil Action No. CV-90-0484-S, Farmers & Merchants Bank of Centre, et al. v. Rutledge, Civil Action No. CV-90-N-0890-S, and this case.[3]

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[2]These counts were dismissed by the District Court subject to reinstatement if the summary judgment in favor of the Labor Department on Count Six is reversed. The Labor Department did not seek summary judgment on these five original counts and made no objection when the District Court dismissed them. The claims against all defendants other than Petitioner were dismissed without objection by the Labor Department..

[3] The cases were consolidated because this case as originally filed was a mirror image of the defendants' position in Rutledge v. Dudley. The instant case was fomented by one of those defendants, Stewart Dudley, through misrepresentations to the Labor Department in an effort to strengthen his defense in the Petitioner's litigation against him and to promote other personal interests. See Appendix IV. The Labor Department filed this action after interviews with and document production from no one except Stewart Dudley. acting as a director of Farmers & Merchants Bank. The complaint filed by the Labor Department so closely paralleled Dudley's position in Rutledge v. Dudley that the District Court consolidated all three of these cases. The cases of Rutledge v. Dudley and Farmers & Merchants

On May 28, 1991, Petitioner filed a counterclaim against the Labor Department alleging violation of his rights under the Right To Financial Privacy Act, 12 U. S. C. §§ 3401, et seq. (Counts One and Two), and the Racketeer Influenced and Corrupt Organizations ("RICO") statutes, 18 U. S. C. §§ 1961, et seq. (Counts Three and Four).

The District Court on June 10, 1991, granted the motion of National Bank of Commerce ("NBC") to file a verified complaint in intervention in all of the consolidated cases. The verified complaint is reproduced as Appendix IV. It details the fraudulent conduct of Stewart Dudley which brought about the consolidated litigation, including this case.

On July 24, 1991, the Labor Department filed an amended complaint, which added to the existing counts a Count Six which alleged that on October 27, 1988, each of the Plans filed an application with the IRS to terminate the Plans and that on November 29, 1988, Lattimer-Stevens exchanged its corporate note, personally guaranteed by Petitioner, for all of the

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Bank v. Rutledge were settled favorably to Petitioner on August 5, 1991.

assets of the Plans in violation of 29 U. S. C. § 1106(a)(1)(B).[4]

On July 24, 1991, the Labor Department filed a motion for summary judgment as to Counts One and Two of Petitioner's counterclaim against it, the Right To Financial Privacy Act claims. On the same day, the Labor Department filed a motion to dismiss Counts Three and Four of Petitioner's counterclaim against it, the RICO counts.

On August 5, 1991, the cases of Rutledge v. Dudley and Farmers & Merchants Bank v. Rutledge were settled with the approval of the District Court. There was no recovery by any party against Petitioner. The Dudleys, F&M Bank, and NBC released all claims against Petitioner and Lattimer-Stevens and made large monetary payments on behalf of or forgave loans to Petitioner and his family interests totaling in excess of $1 million.

On September 16, 1991, Petitioner filed a response, supported by affidavits and exhibits, in opposition to the Labor

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[4] This was the only claim on which the Labor Department ultimately sought relief against Petitioner.

Department's motion for summary judgment on Counts One and Two of Petitioner's counterclaim and a brief in opposition to the motion to dismiss Counts Three and Four of the counterclaim, the RICO counts.

On September 27, 1991, Petitioner was indicted in a criminal proceeding and that case was assigned to the same district judge to which this case and the other consolidated cases had been assigned. The indictment contained nine counts: Counts One and Two charged Petitioner with making a false statement on a pension plan reporting form for 1985, one count for each Plan; Count Three charged Petitioner with making a false statement to a bank to obtain a loan; Count Four charged Petitioner with transferring $178,426.88 in Plan funds to Lattimer-Stevens in February of 1988; Count Five charged Petitioner with transferring $175,000.00 in Plan funds to Lattimer-Stevens in September of 1988; Count Six charged Petitioner with making a false statement to a bank to obtain a loan; Counts Seven and Eight charged Petitioner with making a false statement on a pension plan reporting form for 1988, one for each plan; Count Nine charged Petitioner with transferring

$260,000.00 in Plan funds to Rutledge Industrial in December of 1989.

On October 11, 1991, the District Court entered an order on his own motion staying this action because Petitioner was the defendant in the criminal case.

The criminal case was tried in January and February of 1992. On February 5, 1992, Petitioner was acquitted of Count Four and convicted of the other counts. This conviction is presently on appeal to the United States Court Of Appeals For The Eleventh Circuit.

On April 13, 1992, the District Court vacated the October 11, 1991, stay and issued the following orders relevant to this appeal: (1) the Labor Department's motion for summary judgment as to Counts One and Two of Petitioner's counterclaim was granted; (2) the Labor Department's motion to dismiss Counts Three and Four of Petitioner's counterclaim was granted.

On April 22, 1992, the District Court entered a Memorandum of Opinion in support of its order of April 13, 1992, granting the Labor Department motion for summary

judgment on Counts One and Two of Petitioner's counterclaim.

On May 27, 1992, the District Court granted the motion of Rutledge Industrial to dismiss the Labor Department's amended complaint as to it after the Labor Department affirmed to the District Court that it concurred in the dismissal.

On June 12, 1992, the District Court sentenced Petitioner to a term of imprisonment and awarded $697,689.90 under the Victim Restitution Act, 18 U.S.C. § 3663, to the trustee of the Plans, an amount that represented the Plans' alleged loss on the $680,000.00 promissory note, plus interest to the date of sentencing.[5] On June 12, 1992, Bennett, the Plans' trustee, agreed to the termination of the Plans and to the appointment of the Pension Benefit Guaranty Corporation ("PBGC") as successor trustee pursuant to 29 U.S.C. § 1342(c). On July 7, 1992, the PBGC terminated the Plans effective March of 1991, and became trustee of the Plans.

The Labor Department filed on July 30, 1992, a motion

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[5] The District Court found that the 10% interest provided for in the promissory note had been timely paid from the date of the note, November 29, 1988, through February of 1992.

for summary judgment only against the Petitioner and only on the claims in Count Six of its amended complaint. The Labor Department argued that when Robert W. Bennett, Petitioner's successor as trustee of the Plans, assumed the duties of trustee in January of 1990 the assets of the Plans consisted only of the promissory note for $680,000.00 at 10% annual interest, that none of the principal of the note had been paid, that this note represented a prohibited loan under ERISA, and that:

"The losses attributable to defendant Petitioner's fiduciary breaches are the $680,000.00 represented by the Promissory Note dated November 29, 1989, from Lattimer-Stevens, which is in bankruptcy and unable to pay, and the interest not collected since February 1992."[6]

The summary judgment motion also sought a permanent injunction against Petitioner ever serving as a fiduciary or service provider for any ERISA plan.

On August 13, 1992, the Labor Department filed in support of this motion for summary judgment a Statement Of Undisputed Facts which included three alleged transactions not

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[6] The promissory note was a demand note. The evidence was undisputed that there had never been any demand for payment of the note. The Plans filed a claim in the Lattimer-Stevens Chapter 11 bankruptcy, the Labor Department did not.

charged in the original or amended complaint, but which were charged in the criminal indictment: (1) that Petitioner transferred $178,426.88 of Plan assets to Lattimer-Stevens on February 10, 1988; (2) that Petitioner transferred $175,000.00 of Plan assets to Lattimer-Stevens on September 21, 1988; and (3) that Petitioner transferred $260,000.00 of Plan assets to Rutledge Industrial on December 6, 1988.

The Labor Department submitted 7 exhibits in support of its motion for summary judgment, all testimony or exhibits in Petitioner's criminal trial: (1) an excerpt of testimony from Petitioner's criminal trial showing the transfer of all Plan assets to Petitioner on September 6, 1984, in the amount of $595,786.77; (2) another exhibit from the criminal trial, a minute of the Lattimer-Stevens Board of Directors dated August 10, 1984, appointing Charles Stevens administrator of the Plans and Petitioner as trustee; (3) a third exhibit from the criminal trial, a notice to the former trustee that Petitioner had been appointed trustee; (4) three Government exhibits from the criminal trial concerning the alleged February, 1988 transfer; (5) three Government exhibits from the criminal trial concerning the

alleged September, 1988 transfer; (6) four Government exhibits *from the criminal trial concerning the* alleged December, 1988 transfer; (7) the transcript of Robert W. Bennett's testimony from Petitioner's criminal sentencing hearing.

On August 25, 1992, Petitioner filed a motion to dismiss this case on the grounds that (1) under the decision in United States v. Halper, 490 U. S. 435 (1989) further prosecution of this case and any judgment that might be entered against Petitioner were barred by the Double Jeopardy Clause of the United States Constitution, and (2) the PBGC had been appointed statutory trustee of the Plans, and the Labor Department thereafter had no standing to prosecute this case.

Petitioner filed in support of his motion to dismiss and in opposition to the Labor Department's motion for summary judgment (1) the Judgment and Commitment Order from his criminal trial showing he had been ordered to pay restitution to the PBGC in the amount of $697,689.90; (2) an excerpt from Petitioner's sentencing hearing showing that the trial judge set this amount of restitution as full compensation for the Plans' alleged losses; (3) an agreement appointing the PBGC as trustee

of the Plans. The Labor Department did not submit the $680,000.00 promissory note as an exhibit Petitioner denied that he was liable for the alleged 1988 transfers.

On September 2, 1992, the Labor Department filed a Reply Memorandum arguing Petitioner had violated 29 U. S. C. §§ 1106(a)(1)(B), 1106(a)(1)(D), and 1106(b)(1) by allegedly executing and exchanging the promissory note on November 29, 1988 for the assets of the Plans. The Labor Department explained to the District Court that it had not submitted the alleged 1988 transfers, totaling $613,426.88, as a basis for the summary judgment, but had submitted them "solely to show that the note amount of $680,000.00 genuinely represents assets transferred from the Plans to the two companies controlled and owned by [Petitioner]...". The Labor Department argued that since the three transactions had been tried in the criminal case, Petitioner could not contest his liability those transactions in "a subsequent civil suit brought by the government.", including the charge of which Petitioner was acquitted because "the underlying transactions were established at the criminal trial."

The Labor Department argued Petitioner had no Double

Jeopardy defense because it was seeking "a $680,000.00 restitution judgment" and, therefore, the claim was rationally related to the remedial goal of compensating the Plans. The Labor Department argued that there could be no double recovery because Petitioner would get credit against the criminal restitution order for any money paid under the civil judgment and vice versa. The Labor Department argued that its request for injunctive relief was remedial and that such injunctive relief was due to be granted under the "'rough remedial justice' permissible as a prophylactic governmental action.'", citing Manocchio v. Sullivan, 768 F. Supp. 814, 817 (S. D. Fla. 1991).[7] The Labor Department made no reference to 29 U.S.C. § 1111 and alleged no circumstances which it claimed justified an additional period of debarment to meet any perceived Government need.

On October 16, 1992, the District Court entered a memorandum opinion and order, which it signed on October

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[7] On September 17, 1992, the Labor Department filed a motion to add the promissory note as an exhibit in support of its motion for summary judgment. The District Court granted this motion on October 16, 1992, the same day it entered its order granting the Labor Departments motion for summary judgment, but the day after the order and memorandum opinion were signed.

15, 1992, denying Petitioner's motion to dismiss, granting the Labor Department summary judgment in the amount of $724,149.25, and entering a permanent injunction against Petitioner ever again serving as a fiduciary or service provider to any ERISA plan.

The District Court made no mention and gave no consideration in its opinion to the effect on the standing of the Labor Department to continue to prosecute this action after the PBGC's appointment as trustee and its termination of the Plans. The District Court merely stated that under 29 U.S.C. §§ 1132(a)(2) and (5), the Labor Department is "empowered" to seek "appropriate relief under 29 U.S.C. §1109" and is authorized to bring an action for injunctive or other equitable relief.

The District Court found that both parties agreed that the conduct with which Petitioner had been charged in the criminal case and the conduct with which he was charged in this case was the same conduct.

The District Court based the summary judgment on the following which he found to be material facts as to which there

was no genuine issue: (1) Petitioner "transferred" (a) $178,426.88 of Plan assets to Lattimer-Stevens in February of 1988 (Count Four of the criminal indictment of which Petitioner was acquitted);[8] (b) $175,000.00 of Plan assets to Lattimer-Stevens in September of 1988 (Count Five of the criminal indictment of which Petitioner was convicted); and (3) $260,000.00 of the Plan assets to Petitioner Industrial in December of 1988. (Count Nine of the criminal indictment of which Petitioner was convicted).[9] The District Court held 29 U. S. C. § 1106(a) of ERISA prohibited these transactions, and 29 U. S. C. § 1109(a) imposed liability on Petitioner as a fiduciary for these transactions.

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[8] The District Court made no reference to the fact of Petitioner's acquittal on this charge, merely stating that Petitioner had made the transfer.

[9] Count Nine of the criminal indictment, of which Petitioner was convicted, charged that Petitioner had transferred this money on January 4, 1990 when NBC seized certificates of deposit which the Plans had pledged to secure a loan which NBC claimed had not been repaid. The same judge sat on that case as on the instant one, except in the criminal case that judge twice held, on motion for acquittal and on motion for new trial, that the evidence was sufficient for a reasonable jury to find beyond a reasonable doubt that the transfer took place under the above circumstances. In the instant case, the documents submitted by the Labor Department were related only to events in December of 1988 and made no reference whatever to NBC seizing certificates of deposit.

The District Court made no mention or finding regarding the $680,000.00 promissory note except to note that it was the sole asset of the Plans when Bennett became trustee. The evidence submitted by the Labor Department regarding the promissory note was the testimony given by Bennett at Petitioner's criminal sentencing hearing in which he testified that the purpose of the promissory note was to provide a funding mechanism whereby the Plans could be terminated. There was absolutely no evidence of any kind offered at the criminal trial, the sentencing hearing, or in support of the Labor Department's motion for summary judgment in this case that the assets of the Plans were exchanged for the promissory note or even that such was the purpose of the promissory note. Moreover, the District Court made no such finding at the sentencing hearing or on summary judgment.

The District Court held that the judgment against Petitioner in this case did not constitute Double Jeopardy because:

"A judgment in favor of the Labor Department, however, will not result in a double recovery. 18 U. S. C. § 3663(e)(2)

provides that "[a]ny amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in -- (A) any Federal civil proceeding."

The District Court imposed on Petitioner by summary judgment a permanent injunction "from serving as a fiduciary or performing services for any ERISA benefit plan." The District Court ignored the fact that Congress had provided under 29 U.S.C. §1111 that immediately upon his criminal conviction for an offense involving the misuse of ERISA pension plan assets, Petitioner was barred from serving as a fiduciary or service provider to an ERISA plan for a period of 13 years from the conviction or the Petitioner's release from prison, whichever came last. Even assuming that District Court had power to add to the statutory period of debarment if special circumstances allegedly justifying such action were pled and proven, the Labor Department did not so plead or offer any evidence of such circumstances. The District Court did not find that there were any special circumstances which authorized a greater period of debarment than that automatically imposed by 29 U.S.C. §

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The District Court certified the summary judgment in favor of the Labor Department under Rule 54(b), Federal Rules Of Civil Procedure, as a final judgment.

Appeal was taken on November 13, 1992.

On February 12, 1993, the District Court dismissed all other claims and parties in this case. The first five counts of the Labor Department's Amended Complaint, were dismissed, without objection by the Labor Department.

1. Proceedings In The Court Of Appeals

The Court of Appeals affirmed the District Court without opinion. Appendix II. On September 8, 1993, the Court of appeals denied Petitioner's application for a rehearing and rehearing en banc. Appendix I.

REASONS FOR GRANTING THE WRIT

I.

The Opinion Below Decided In Conflict With The Established Decisions Of This Court, Including United States v. Halper, That The Double Jeopardy Clause Of The United States Constitution Does Not Bar A Second Monetary Recovery In A Civil Action Following Imposition Of A Monetary Judgment Under The Victim Restitution Act In A Prior Criminal

Proceeding Where The Government Admits That The Two Judgments Offset Each Other And Collection Of Any Money Under One Is A Credit Against The Other

In United States v. Halper, 490 U.S. 435, 447-448, 109 S.Ct. 1892, 1901, 104 L.Ed.2d 487 (1989), this Court held in the context of deciding whether a monetary judgment for the Government in a civil action subsequent to criminal conviction constituted a multiple punishment that "the labels 'criminal' and 'civil' are not of paramount importance." id. 490 U.S. at 447, 109 S.Ct. at 1901. After recognizing that civil proceedings may advance punitive as well as remedial goals", this Court found that the "notion of punishment, as we commonly understand it, cuts across the divisions between the civil and the criminal law" requiring the Court to "follow the notion where it leads." Therefore, this Court held:

"...the determination whether a given civil sanction constitutes a punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." (emphasis supplied) Id. 490 U.S. at 447-448, 109 S.Ct. at 1901.

The essence of the Court's opinion in Halper is that, "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case

serves the goal of punishment." (emphasis supplied) id. 490 U.S. at 448, 109 S.Ct. at 1901-1902.

The definition of when a civil sanction following a criminal conviction is "punishment" is clear in Halper:

"From these premises, it follows that a civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term." (emphasis supplied). id. 490 U.S. at 448, 109 S.Ct at 1902.

Having defined when a civil sanction is a "punishment", the Court applied the definition to the Double Jeopardy context as follows:

"We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." id.

The restitution award of $697,689.90 to the PBGC in the criminal case was far more than any proven loss to the Plans. The Petitioner was convicted of two counts of transferring the funds of the Plans to Lattimer-Stevens and Rutledge Industrial totaling $435,000.00. The Petitioner was acquitted of transferring $178,426.88 to Lattimer-Stevens. At the sentencing

hearing, the District Court found by a preponderance of the evidence, and despite the jury verdict, that Petitioner was responsible for this transfer and added the amount of $178,426.88 to increase the Sentencing Guidelines level of Petitioner's punishment. The allegedly proven losses to the Plans, even with this addition, was $613,426.88, an amount $84,463.02 less than the restitution award. The District Court found that interest had been paid on the note through February of 1992, so that 10% annual interest for the 3 1/2 months from March 1, 1992 to June 12, 1992, would add only $19,831.00. These alleged losses could not support the criminal restitution award, much less a second judgment in the amount of $724,149.25. Consequently, the Labor Department has conceded the obvious truth, that the restitution award by the District Court in the criminal case was based on the $680,000.00 note, plus interest.

There was no mention of or reference to the promissory note in the criminal trial. However, the prosecution did offer the promissory note at Petitioner's criminal sentencing through the testimony of Robert W. Bennett, Petitioner's successor trustee.

The Labor Department extracted Bennett's testimony from the criminal sentencing record and offered it in its entirety as an exhibit in support of its motion for summary judgment in this case. Bennett testified that there was a promissory note from Lattimer-Stevens, personally guaranteed by Rutledge, for $680,000.00 made payable to the Plans, but further testified that in his discussions with Stewart Dudley prior to him becoming trustee of the Plans, Dudley represented to him as follows:

"Q: Mr. Bennett, did in fact Mr. Dudley, the accountant, tell you that he prepared this note and approved it on behalf of the plans, and approved as his CPA, and it was also a mechanism of which the plans were going to be terminated? A: That is correct."

Bennett further testified that he became the trustee of the Plans after purchasing Lattimer-Stevens in January of 1990, but that he knew prior to his purchase of Rutledge Industrial that Stewart Dudley had been in control of the Plans for many years. Therefore, he required a written assurance from Stewart Dudley that the Plans were in proper order before he would become the trustee. Bennett testified that on December 23, 1989, Stewart Dudley signed a letter addressed to Bennett stating:

"Dear Bobby: This letter confirms my oral representations to you

to induce you to become the trustee and administrator of the Lattimer-Stevens Company Pension Plans that from August of 1984 to date I have served as attorney, accountant, investment advisor to such pension plans. I have personally directed and controlled the use of all pension plan assets since August of 1984, and that there have been no improper or illegal transactions related to the pension plans or the pension plans' assets."

The same district judge had this same testimony before him in the criminal sentencing procedure and in the summary judgment motion submissions by the Labor Department in this case. There was no other testimony of any kind regarding the promissory note offered in either the criminal sentencing hearing or in support of the summary judgment motion in this case.

Therefore, according to the only evidence before the District Court in either case relating to this promissory note, it was not given in exchange for the assets of the Plans, but was a mechanism designed and prepared by Stewart Dudley in his capacity as attorney, accountant, and investment advisor, through which the Plans could be terminated. Accordingly, not only was the monetary judgment in this case not reasonably calculated to compensate the government for its losses since it added nothing to the restitution award, but it was grossly in

excess of any losses of the government as to which there was any evidence.

Neither the prosecutors in the criminal case or the Labor Department in this case sought civil penalties, attorney's fees, or reimbursement for the costs of investigating and prosecuting Petitioner. The District Court made no such award in either case. Therefore, there is no issue in this case of compensating the Government for such items.

The Labor Department correctly concedes that civil penalties are not available under ERISA for breaches of fiduciary duties occurring prior to December 19, 1990. 29 U.S.C. 1132(1) (Supp. II 1990). Moreover, attorneys fees are collectible only in private party actions. id. § 1132(g)(1). The Labor Department did not request in this case civil penalties, attorney's fees, or reimbursement for the costs of investigating or prosecuting Petitioner. There is, therefore, by the Government's own admission and the District Court's decision, no rational relationship to the goal of making the Government whole and no remedial purpose for the second monetary judgment.

The remedial-punishment analysis in the instant case differs from any previously decided by this Court. The Labor Department admits, and the District Court held, that it is not attempting to add anything to the Government's compensation by seeking the civil monetary judgment because to the extent the PBGC collects a dollar on the first judgment, that dollar must be subtracted from the second, and vice versa. Therefore, the inquiry referred to in Halper as to determining the remedial purposes of the monetary civil sanction is automatically resolved in favor of Petitioner in this case because the two judgments simply offset each other.

The effect of the Halper. decision on the judgment entered against the Petitioner in this case is clear, the prosecution of the second action in this situation is barred by the Double Jeopardy Clause:

"In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." Halper, 490 U.S. at 451, 109 S.Ct. at 1903.

The District Court refused to apply the particularized

inquiry required by Halper. Instead, the District Court looked to the general nature of 29 U.S.C. § 1132 as a remedial statute. The result of this flawed analysis was to put paramount importance on the labels "civil" and "criminal" contrary to the clear direction in Halper not to do so. Inevitably, this incorrect view of Halper led to the District Court's failure to find that the "civil" sanction in these circumstances was not rationally related to making the Government whole and was barred under this Court's multiple punishment Double Jeopardy Clause analysis.

II.

The Opinion Below Decided In Conflict With The Established Decisions Of This Court, Including United States v. Halper, That The Double Jeopardy Clause Does Not Bar The District Court In A Subsequent Civil Action From Entering A Permanent Lifetime Injunction Prohibiting The One Enjoined From Ever Serving As A Fiduciary Or Service Provider To An ERISA Plan Where The One So Enjoined Had Been Previously Criminally Convicted Of Offenses Which Invoked The Automatic Debarment Of That Person Under 29 U.S.C. § 1111 For A Period Of Thirteen Years From Serving As A Fiduciary Or Service Provider To An ERISA Plan

The District Court also entered by summary judgment a

permanent injunction against Petitioner serving as a fiduciary or service provider to any ERISA plan. This permanent injunction was sought by the Labor Department even though immediately upon his criminal conviction, the automatic operation of 29 U.S.C. § 1111 debared Petitioner from serving as a fiduciary or service provider to any ERISA plan for a period of 13 years from his conviction or Petitioner's release from confinement, whichever came last.

The Labor Department was apparently not satisfied with this period of debarment and sought a lifetime injunction, citing as authority Beck v. Levering, 947 F.2d 639, 641 (2d Cir. 1991) and Martin v. Feilen, 965 F.2d 660, 673 (8th Cir. 1992).[10] Neither Beck nor Martin involved the imposition of an injunction after a criminal conviction and thus did not implicate 29 U.S.C. § 1111 or invoke a Double Jeopardy analysis.

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[10] The motivation of the Labor Department was clearly not remedial since Petitioner was sentenced to serve 106 months after the criminal conviction. The debarment period would thus run for approximately 20 years, meaning the Petitioner would br debared until he was in his mid-seventies. There was no allegation or proof that this period of debarment was inadequate to protect the interests that the Government was charged with protecting in this situation. This combination of factors requires the conclusion that the only purpose sought to be served by the permanent injunction was punishment and retribution.

This Court directly addressed this situation in Halper:

"On the other hand, when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." Halper, 490 U.S. at 451 n. 10, 109 S.Ct. at 1903 n. 10.

The immediate imposition of the debarment period specified in § 1111 without reference to an appeal of the criminal conviction stated a legislative decision as to the appropriate debarment period necessary to protect the interests with which the Government is concerned in this type of situation. The imposition by the District Court of a lifetime debarment period without even making reference to § 1111 and without having before it any allegation or evidence relating to a perceived need to bar Petitioner beyond the statutory period, even assuming that would be permissible in some circumstances, makes the imposition of this additional period of debarment a clear punishment and retribution.

III.

The Opinion Below Decided In conflict With The Established Decisions Of This Court, Including United States v. Halper and United States v. Dixon,

That The Double Jeopardy Clause Under A Successive Prosecutions' Analysis Does Not Bar A Subsequent Civil Prosecution By The Government Following A Criminal Conviction And Acquittal Where The Government Relies On The Same Conduct And The Same Evidence To Prove Its Case In Both Actions, Where The Offenses Charged In Both Actions Do Not Each Require Proof That The Other Does Not, And Where A Particularized Inquiry Shows That The Prosecution Of The Civil Action Is For Purposes Of Punishment And Retribution

The Double Jeopardy Clause is designed to protect an individual from being subjected twice to prosecution for the same offense, whether acquitted or convicted in the first trial, as well as from multiple punishment. The Halper opinion stated the scope of the Double Jeopardy Clause:

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." (emphasis supplied) 490 U.S. at 440, 109 S.Ct. at 1897.

See, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed2d 656 (1969).

In United States v. Dixon, __U.S.__, 113 S.Ct. 2849, 2856, __L.Ed.2d___ (1993), this Court recognized that the

same analysis was applicable whether the context was multuiple punishments or prosecutions.:

"In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the `same elements" test, the double jeopardy bar operates."

In Brown v. Ohio, 431 U.S. 161, 165, 97 S.Ct. 2225, 53 L.Ed.2d 187 (1977), this Court held that the Fifth Amendment serves principally as a restraint on courts and prosecutors, leaving the legislature free to define offenses and fix punishments. However, once the legislature has acted, courts may not impose more than one punishment for the same offense and prosecutors may not attempt to secure that punishment in more than one trial.

This Court has repeatedly held that "humane concerns" are an inherent Double Jeopardy Clause consideration and that it is the purpose of the Double Jeopardy Clause to prohibit the Government with all of its resources and power from making repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and

insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969); United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975); Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L. Ed. 2d 265 (1975); United States v. Dinitz , 424 US 600, 47 L.Ed.2d. 267, 96 S.Ct. 1075 (1976); United States v. Martin Linen Supply Co, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed. 2d 642 (1977); Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

In Halper, this Court laid the foundation for a successive prosecutions analysis where the second action following a criminal conviction or acquittal is an ostensible civil action:

"But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the `humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. [citation omitted] This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state,

In making this assessment, the labels `criminal' and

'civil' are not of paramount importance....The notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." Halper, 490 U.S. at 447-448, 109 S.Ct. at 1901..

This multiple punishments analysis is in every respect applicable to the "humane concerns" surrounding this Court's successive prosecutions analysis. The line between "civil" and "criminal" actions in terms of whether they serve the purposes of punishment is no more blurred when viewing those actions as a whole prior to judgment than they are when viewing the results of those actions only in terms of the relief granted. In fact, the second prosecution at issue in Halper inevitably produced a judgment that was a punishment prohibited by the Double Jeopardy Clause because the amount of the punishment was automatic upon the District Court finding for the Government.

One of the most far reaching pieces of legislation in terms of blurring the historical division between "civil" and "criminal" actions is the Victim and Witness Protection Act, Pub. L. No. 97-291, 69 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C.), legislation directly involved in

the instant case. This statute provides, in part, that at the end of a criminal trial the District Judge, sitting without a jury, can make a monetary award to all "victims" of the crimes of which the defendant has been convicted, including the Government. 18 U.S.C. § 3663.

This statute provides that in the sentencing of a defendant who has been convicted of a criminal offense in federal court, the District Court "may order in addition to or, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense." 18 U.S.C. § 3663(a). The District Court, sitting without a jury, is authorized to make determinations and award damages on the same basis as in civil actions. id. § 3663(b). The statute specifically provides that the Government and private victims may enforce the restitution award "in the same manner as a judgment in a civil action." id. § 3663(h). The restitution award may be made a condition of the defendant's probation and supervised release and can be enforced by revocation of probation, contempt, and modifications of the terms of supervised release. id. § 3663(g). This mixture of the elements of criminal punishment and civil

sanctions is illustrative of the Halper holding that the labels of "criminal" and "civil" are not of paramount importance in Double Jeopardy Clause analysis.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), established a test which inquires whether each offense contains an element not contained in the other and, if not, the Double Jeopardy Clause bars additional punishment and successive prosecution. This Court has reaffirmed the Blockburger test in United States v. Dixon, supra, 113 S.Ct. at 2856 as the test for determining if the Double Jeopardy Clause bars a subsequent prosecution. The second prosecution in the instant case is barred because the only difference in the elements of the criminal offense in 18 U.S.C. § 664, the statutory basis of the criminal charges of which Petitioner

was convicted and the one of which he was acquitted, and the civil offense under which the Labor Department sought relief against Petitioner in this case, 29 U.S.C. 1106 (a) and (b), is that the taking or misappropriation of Plan assets in violation of 18 U.S.C. 664 requires fraudulent intent while 29 U.S.C. 1106 does not. Compare, United States v. Andreen, 628 F.2d 1236 (9th Cir. 1980) with Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987).

Double Jeopardy analysis should be based on consecutive prosecutions and the prosecution of this action should be barred in the circumstances present in this case of the Government prosecuting an ostensible civil action following a criminal conviction where the Government relies on the same conduct and the same evidence to prove its case in both actions, where the elements of the criminal and civil offenses at issue are so identical that the only difference is that the criminal case requires proof of fraudulent intent while the civil case does not, where the relief sought by the Government is either duplicative and off-setting to that obtained in the criminal case or based on an equitable increase in the statutory relief automatically granted

on the criminal conviction without an allegation of the basis for such equitable relief, and there is no claim for civil penalties and other relief not available in the criminal action?

Petitioner moved to dismiss this case prior to judgment because continued prosecution of it was barred by the Double Jeopardy Clause under the successive prosecutions' analysis. The District Court analyzed Petitioner's Double Jeopardy defense only under a multiple punishment analysis, misreading Halper. This led to error which must be reversed if the decisions of this Court are to be given their full and intended effect.

IV.

The Opinion Below Erroneously Decided An Important Question Of Federal Law Which Should Be Decided By This Court As To Whether The Pension Benefit Guaranty Corporation Has The Exclusive Authority And Standing To Prosecute Actions For The Benefit Of An ERISA Plan After It Has Been Appointed Statutory Trustee And Has Terminated The Plan Pursuant To 29 U.S.C. §§ 1342(d)(1)(B)(ii) and (iv).

Petitioner moved to dismiss this action on the ground that the PBGC had been appointed as trustee of the Plans and that, "Plaintiff is no longer the proper party to seek a judgment

against this Defendant.". The District Court denied the motion to dismiss without addressing the question of the effect on the Labor Department's standing of the appointment of the PBGC as statutory trustee of the Plans, stating only that 29 U. S. C. §§ 1132(a)(2) and (5) authorize the Labor Department to seek appropriate relief under 29 U. S. C. § 1109 and to seek appropriate injunctive relief.

The authority of the Labor Department to initiate or prosecute an action under §§ 1132(a) (2) and (5) does not survive the appointment of the PBGC as trustee and its termination of pension plans under 29 U.S.C. §§ 1342(d)(1)(B)(ii) and (iv). Under the statutory scheme, all of the responsibility and authority for the collection of assets and the maintenance of actions on behalf of terminated plans is given to the PBGC. Moreover, the all inclusive language of 29 U. S. C. § § 1342(d)(1)(B)(ii) and (iv) makes the responsibility and authority of the PBGC exclusive after its appointment as trustee and its termination of the pension plans at issue.

The PBGC is a wholly owned government corporation that administers a self-financing pension plan termination

insurance program under Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (1985 & Supp. 1992). The PBGC guarantees certain benefits under defined benefit pension plans covered by Title IV of ERISA, 29 U.S.C. §§ 1321-1322. To pay for the costs of this insurance, all covered pension plans must pay the PBGC an annual premium. 29 U.S.C. § 1307. When a plan is terminated and the PBGC is appointed statutory trustee, all plan assets are transferred to the PBGC. The PBGC then pays plan benefits guaranteed under Title IV of ERISA making up the deficiency in plan assets out of its own funds. 29 U.S.C. §§ 1322, 1361. Pension Benefit Guaranty Corporation v. FEL Corporation, 798 F. Supp. 239, 240 (D. N.J.1992).

The Labor Department asserts that it has the authority and standing to continue to maintain this action for a recovery on behalf of the Plans and for equitable relief even though the Plans have been terminated and the PBGC appointed statutory trustee. This contention is contrary to the statutory scheme set forth above and particularly 29 U.S.C. § 1342 (a), (e), and (f). The statutory scheme divests all entities other than the PBGC of any standing to represent the Plans in any manner after the PBGC is

appointed statutory trustee.

The PBGC and the Labor Department are not the same entity. The District Court erroneously found in his order denying Petitioner's motion to dismiss that, "The Pension Benefit Guaranty Corporation is, in fact, established within the Department of Labor by 29 U. S. C. § 1302(a)." The PBGC is, in fact, established as an independent government corporation with the right to sue and be sued in its own name and with all the other powers of independent government corporations. 29 U. S. C. § 1302(b). The PBGC has the power to encumber and dispose of its own assets (*id.* § 1302(b)(5). The Secretary of Labor is only one of its three directors, the other two being the Secretaries of the Treasury and Commerce (*id.* § 1302(d). The PBGC has the authority to issue its own notes and obligations in its own name (*id.* § 1305(c). The funds of the PBGC are segregated from all other funds (*id.* 1305). The PBGC makes its annual reports directly to the Congress, not to the Labor Department (*id.* § 1308). It has the independent authority without regard to the Labor Department to institute proceedings to terminate pension plans and appoint trustees (*id.* § 1342).

The PBGC has exclusive authority to control the termination of pension plans and all matters related thereto, including the collection of any money due the pension plans taken over by it from employers and other fiduciaries. (29 U. S. C. §§ 1344-1395). Once the PBGC is appointed as trustee and terminates the pension plan in question, the PBGC has the exclusive right to bring and prosecute pending actions relating to the pension plan and all other actions must be stayed. 29 U.S.C. § 1342(f).

The Agreement For Appointment Of Trustee And Termination Of Pension Plan signed by the PBGC on July 7, 1992 terminated the Plans effective March 28, 1991 and the PBGC became statutory trustee under 29 U. S. C. § 1342(c). Trustees appointed under this section are authorized by 29 U. S. C. § 1342(d)(1)(B)(ii) "to collect for the plan any amounts due the plan" and (iv) "to commence, prosecute, or defend on behalf of the plan <u>any suit</u> <u>or proceeding</u> involving the plan." (emphasis supplied)

Rule 17(a), Federal Rules Of Civil Procedure, requires that all actions be prosecuted in the name of the real party in interest and, after reasonable notice and opportunity for the real

party in interest to appear and intervene, the case should be dismissed if the real party in interest has not done so. The Labor Department is not the real party in interest in this case because any monetary award obtained by it would be for the benefit of the PBGC and because it made no showing on which to base its claim for injunctive relief beyond that automatically provided for in 29 U.S.C. § 1111.

The District Court based its opinion denying Petitioner's motion to dismiss this action on the ground that the Labor Department had the authority to bring this action under 29 U.S.C. § 1132. The opinion failed to consider the implications on the Labor Department's standing of the appointment of the PBGC as trustee and its termination of the Plans and failed to consider the requirements of Rule 17(a) of the Federal Rules of Civil Procedure. This Court has never spoken to the question of the exclusive authority of the PBGC to represent pension plans of which it has become trustee and which it has terminated. The statutory scheme has clearly been bypassed in this case and this important question of federal law should be decided by this Court.

V.

The Opinion Below Incorrectly Decided An Important Question Of Federal Law Which This Court Should Decide As To Whether An Agency Of The United States Is Subject In A Compulsory Counterclaim To A Set-off Based On Violations By That Agency Of The Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. §§ 1961, et seq.

Counts Three and Four of Petitioner's Counterclaim against the Labor Department were based on alleged violations of 18 U. S. C. §§ 1961, *et. seq.*, popularly referred to as the Racketeer Influenced and Corrupt Organizations Act. The Labor Department argued in its motion to dismiss these counts of the Counterclaim that, "As an agency of the United States, suit against plaintiff is barred by the Doctrine of Sovereign Immunity." The District Court granted the Labor Department's motion to dismiss on the sole ground that, "The United States of America and the United States Department of Labor are immune from suits for damages." [11]

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[11] It is not clear what the Labor Department and the District Court meant by these blanket statements since, as a blanket and absolute statement of law, they are clearly wrong as illustrated, for example, by the Right To Financial Privacy Act. Perhaps the District Court meant to say that the Labor Department is immune from suits for damages except where authorized by law.

The RICO counts in Petitioner's counterclaim are not original actions, but are counterclaims. Rule 13(d), Federal Rules of Civil Procedure, provides that counterclaims may be brought against the United States so long as the rules are "not construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."

In United States v. Johnson, 853 F. 2d 619 (8th Cir. 1988), the court held that the Tort Claims Act did not bar a defendant's counterclaim against the United States based on negligent misrepresentation when the government waived its sovereign immunity by suing the defendant on promissory notes signed by the defendant to obtain farm storage loans. For the general principle that the bringing of an action by a federal government agency waives sovereign immunity as to compulsory counterclaims for damages up to the amount of any recovery by the federal agency see Cox v. Kurt's Marine Diesel Of Tampa, Inc., 785 F. 2d 935 (11th Cir. 1986) and EEOC v.

First National Bank of Jackson, 785 F. 2d 936 (5th Cir. 1986) These recoupments or set-offs are well within the law.

Moreover, while there is authority for the proposition that federal government agencies are outside the scope of RICO's coverage in original actions, Berger v. Pierce, 933 F. 2d 393, 397 (6th Cir. 1991), there has been no decision on the question of whether an agency of the United States is immune from RICO claims when they are asserted in a counterclaim and recovery is limited to the amount recovered by the Government in its original action to which the counterclaim is responsive.

The federal courts have long held that state and local governmental agencies are subject to RICO, albeit as the RICO "enterprise": United States v. Clark, 646 F. 2d 1259 (8th Cir. 1981) (the office of county judge); United States v. Angelli, 660 F. 2d 23 (2nd Cir. 1982) *cert. denied* 455 U. S. 910 (1982) (a New York city court); United States v. Long, 651 F. 2d 239 (4th Cir. 1981) (a state senate seat); United States v. Davis, 707 F. 2d 880 (6th Cir. 1983) (a county sheriff's department); United States v. Kovic, 684 F. 2d 512 (7th Cir. 1982) *cert, denied* 459 U. S. 972 (7th Cir. 1982) (a city police department);

United States v. Stratton, 649 F. 2d 1066 (5th Cir. 1981) (a judicial circuit of a state) (a long list of cases from federal courts holding that governmental entities are subject to RICO is collected at 649 F. 2d at 1074-1075); United States v. Altomare, 625 F. 2d 5 (4th Cir. 1980) (a county prosecutor's office)

In United States v.Brown, 555 F. 2d 407 (5th Cir. 1977), the court held that it would not narrow the sweeping language of RICO to exclude the Macon, Georgia police department. The court found that the RICO language, "any legal entity", meant exactly what it said and included all legal entities. Moreover, the court found in the Congressional statement of findings relative to RICO that Congress was concerned about "the impact of crime on the entire democratic process itself." Accordingly, the court held, "It would be anomalous for us to recognize this broad congressional statement and yet construe the word "enterprise" to encompass only those entities or groups of individuals within the private sector." (555 F. 2d at 416)

In Berger v. Pierce, supra, the court incorrectly held that, "Section 1961(1), in turn, defines 'racketeering activity', which requires that the defendant be variously, 'chargeable',

indictable', or 'punishable' for violations of specific state and federal criminal provisions." (emphasis supplied) (933 F. 2d at 397) The court reasoned from this erroneous premise that since the federal government and its agencies cannot be indicted, charged, or punished under state or federal law, RICO does not apply. In fact, § 1961(1) does not require that the "defendant" be chargeable, indictable, or punishable, only that the act be amenable to these actions. The Berger court could not find any authority to cite except a district court case, Wilev v. Federal Land Bank, 657 F. Supp. 964 (S. D. Ind. 1987), which in its turn cites no authority for its conclusion.

The Labor Department argued for the first time on appeal that there were various pleading deficiencies in Petitioner's RICO claims. This argument was not made or ruled on at the District Court level and is not correct. In any event, the issue is squarely presented by the decision of the District Court: is an agency of the Federal Government subject to the RICO statutes on a compulsory counterclaim?

VI.

The Violation Of The Right to Finanical Privacy Act

Entitles The Injured Party To An Injunction Which Prohibits Documents And Information Obtained In Violation Of The Act From Being Used In Civil Litigation Which Is An Important Question Of Federal Law Not Previously Addressed By This Court.

The Right To Financial Privacy Act, 12 U. S. C. § 3402, prohibits any Government authority from having access to, obtaining copies of, or obtaining information from the information contained in the financial records of any customer of a financial institution unless the records are reasonably described and one or more of the succeeding sections of the Act are complied with by the Government prior to obtaining such records: (1) the customer has authorized such disclosure in accord with § 3404, (2) the financial records are disclosed in accord with an administrative subpoena or summons which meets the requirements of § 3405, (3) the records are disclosed in response to a search warrant under § 3406, (4) the records are disclosed in response to a judicial subpoena under § 3407, or (5) the records are disclosed in response to a formal written request under § 3408. The exceptions to these requirements are (1) § 3403(c), a financial institution may notify a Government

authority that it has information relevant to a violation of law, but the notification may include only the name of the customer and the nature of any suspected violation, (2) § 3403(d), a financial institution perfecting a security interest or proving a claim in bankruptcy, (3) § 3413, a list of special situation exceptions, none of which are applicable here, and (4) § 3414, certain foreign intelligence gathering exceptions. The Labor Department has never contended that Petitioner's personal financial records fall within any exception to the RFPA.

The sole basis advanced by the Labor Department for its summary judgment motion was that it did not seek or obtain any of Petitioner's personal financial records, but obtained only the financial records of the Plans. The District Court granted summary judgment solely on this basis:

"The plaintiff's motion for summary judgment filed on July 24, 1991, as to Counts One and Two of the Counterclaim filed by defendant Petitioner [Document # 86] should be and the same hereby is GRANTED. The undisputed evidence shows that the plaintiff sought and obtained only the records of Lattimer-Stevens Pension Plans and not the personal financial records of defendant Petitioner. In any event, the Right to Financial Privacy Act does not provide for the kind of injunctive relief sought by defendant Petitioner. Counts One and Two of the Counterclaim are DISMISSED."

The only submissions made by the Labor Department in support of its motion for summary judgment on the RFPA counts were the affidavits of Labor Department Investigators Gilstrap and Watkins.

Stewart Dudley sought and obtained a meeting with Labor Department Investigator Gilstrap on November 20, 1990. The handwritten notes made by Labor Department Investigator Gilstrap of his initial November 20, 1990 meeting with Stewart Dudley show that (1) Dudley informed Gilstrap that Petitioner's personal bank records from F&M Bank showed that Petitioner personally borrowed $175,000.00 from F&M Bank to acquire stock in Lattimer-Stevens in June of 1984, two months before Petitioner even became trustee of the Plans, (2) Petitioner borrowed personally $380,000.00 from NBC, (3) Petitioner wrote a personal check to F&M Bank to be deposited in the Plans account, and (4) Petitioner personally borrowed $228,000.00 from F&M Bank. In the formal report of this meeting, Gilstrap stated no grand jury information was discussed at the meeting, so this information was not protected under that rubric. The evidence was undisputed the Labor

Department knew that Dudley was using his position as a director of F&M Bank to obtain Petitioner's personal bank records and turning over to the Labor Department those records and information from them. Labor Department Investigator Gilstrap stated in a November 20, 1990, memorandum to Labor Department Deputy Area Director Davis that Dudley "stated that he has all of the necessary documentation needed to prove these violations and will provide them to us pursuant to a subpoena. His position as a director of the Bank gives him access to these records." (emphasis supplied)

Gilstrap never denied he had obtained information from and copies of Petitioner's personal financial records from Dudley.

The affidavit of Watkins stated that (1) all of the documents he reviewed were provided to him by Dudley under administrative subpoenas issued to F&M Bank and "to Mr. Dudley's CPA firm", (2) to the best of his knowledge he reviewed only documents related to the Plans, (3) the "voluminous records provided to me by Mr. Dudley may have incidentally contained personal bank records of Mr. Petitioner.",

but "they were not provided pursuant to the above mentioned subpoenas and were neither relied upon in my investigation not in the Report of Investigation."

However, in his subsequent deposition, Watkins identified a number of items from Petitioner's personal bank records at F&M Bank and NBC which he had examined and included in his official reports. When confronted with the contradiction between his affidavit and his deposition testimony, Watkins stated, "My answer would be I considered those documents that you just pointed out to be bank records -- bank records or records relating to the plan." This explanation was immediately abandoned in the following question and answer:

"Q: So you considered Item 29, for example, copies of personal checks with W. Eugene Petitioner dated 1-22-85 not to be personal bank records of Mr. Rutledge? You don't mean that; do you Mr. Watkins?
A: No. I certainly don't."

Watkins was very clear that there was no notification as required by the RFPA to Petitioner.

The rights of the customer to judicial relief prior to

release of his records and the procedures to be followed in the judicial proceedings are set forth in § 3410, and include the right to appeal an adverse ruling. § 3416 provides that an action to enforce violations of the RFPA may be brought in district court within three years of any violation of the Act.

The right to monetary damages is set forth in § 3417 which allows the customer to obtain (1) any actual damages sustained, (2) punitive damages for willful or intentional violation of the ACT, and (3) attorney's fees and costs of the action to enforce the RFPA.

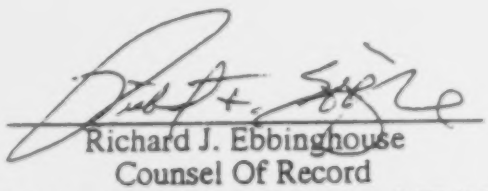
The right to injunctive relief is set out in § 3418 which provides that "injunctive relief shall be available to require that the procedures of this chapter are complied with." In Hunt v. U. S. Securities & Exchange Commission, 520 F. Supp. 580 (D. C. Tex. 1981), the court held that injunctive relief is available to enforce the Act without regard to whether the Government authority has already obtained the records or not. Indeed, no other rule would make sense if the provisions of the RFPA are to be enforced. Judge Nelson ruled that as a matter Petitioner was not entitled to injunctive relief to suppress the records

because, "...the Right To Financial Privacy Act does not provide for the kind of injunctive relief sought by defendant Petitioner." Such a holding makes the purpose of the Act meaningless.

CONCLUSION

The writ of certiorari sought by this petition presents important issues of Double Jeopardy Clause jurisprudence and important issues of federal law which ought to be decided by this Court. The writ of certiorari should be granted.

Respectfully submitted,



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Appendix I

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-7011

DEPARTMENT OF LABOR, Robert B. Reich, Acting Secretary

Plaintiff-Appellee,

versus

W. EUGENE RUTLEDGE,

Defendant-Appellant.

On Appeal from
the United States District Court for
the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and Paine*, Senior District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule

35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
United States Circuit Judge

ORD-42
(9/91)

*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix II

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-7011

D.C. Docket No. CV 91-N-114-S

DEPARTMENT OF LABOR, Robert B. Reich, Acting Secretary,

Plaintiff-Counter-
Defendant-Appellee,

versus

W. EUGENE RUTLEDGE,

Defendant-Third-Party
Plaintiff-Counter
Claimant-Appellant,

THE RUTLEDGE INDUSTRIAL CORPORATION;
LATTIMER-STEVENS COMPANY;
LATTIMER-STEVENS COMPANY SALARIED
& HOURLY RATED EMPLOYEES'
RETIREMENT PLANS,

Defendants,

CHEROKEE BANCORP; SANDRA SENTELL; RICHARD LINDSEY; ALBERT SHUMAKER; TRAVIS JAMES; JACK JENNINGS; JOE HICKS,

Intervenors-Defendants,

STEWART DUDLEY,

Intervenor-Defendant-Third-Party Defendant,

J. W. HAMPTON; C. R. DUDLEY,

Intervenors-Defendants,

INTERNAL REVENUE SERVICE,

Movant,

DUDLEY, HOPTON-JONES, SIMS & FREEMAN; BALCH & BINGHAM; BRADLEY, ARANT, ROSE & WHITE,

Third-Party Defendants.

Appeal from the United States District Court for the Northern District of Alabama

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(July 7, 1993)

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and Paine*, Senior District Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

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*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix III

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LYNN MARTIN, Secretary of the United States Department of Labor,

Plaintiff,

vs.

W. EUGENE RUTLEDGE, the RUTLEDGE INDUSTRIAL CORPORATION, the LATTIMER-STEVENS COMPANY SALARIED AND HOURLY RATED EMPLOYEES' RETIREMENT

Defendants.

W. EUGENE RUTLEDGE,

Third Party Plaintiff,

vs.

DUDLEY, HOPTON-JONES, SIMS & FREEMAN, a certified public accounting firm,

Third Party Defendant.

Case No. CV 91-N-0114-S

MEMORANDUM OF OPINION

This action is before the Court on the plaintiff's Motion for Summary Judgment filed July 30, 1992, and the defendant's Motion to Dismiss, which was incorporated in his response to the Motion for Summary Judgment.

I. BACKGROUND

The defendant, W. Eugene Rutledge, purchased the Lattimer-Stevens Company in 1984. At that time, company employees were covered by two pension plans--the Lattimer-Stevens Salaried Employees' Retirement Plan and the Lattimer-Stevens Hourly Rated Employees' Retirement Plan (hereinafter referred to as "the Plans"). On August 10, 1984, the Lattimer-Stevens Board of Directors, chaired by the defendant, adopted a resolution removing the Huntington National Bank of Columbus,

Ohio, which had served as trustee of the Plans for twenty-five years, and appointing the defendant. The defendant directed the Huntington Bank to transfer the assets of the Plans to him. By September 6, 1984, total assets in the amount of $384,831.19 for the Salaried Plan and $210,955.58 for the Hourly Plan had been transferred to the Farmers and Merchants Bank in Centre, Alabama, at the direction of the defendant. In February 1988, the defendant transferred $178,426.88 of Plan assets to the Lattimer-Stevens Company (Pl's Ex. 4, Bank Records). In September he transferred $175,000.00 from the Plan account to the Lattimer-Stevens Company, and in December, he transferred $260,000.00 to Rutledge Industrial Corporation (Pl's Ex. 5 and 6, Bank Records). In January 1990, Mr. Robert W. Bennett purchased both the Lattimer-Stevens Company and the successor to Rutledge Industrial Corporation, Acme Corporation, from the defendant and his family. At the same time, Mr. Bennett became the trustee for

the Plans. The sole asset of the Plans then consisted of a promissory note in the amount of $680,000.00 from the Lattimer-Stevens Company guaranteed personally by the defendant.

On January 17, 1991, the Secretary of Labor filed this civil action praying that defendant Rutledge and the Lattimer-Stevens Company provide restitution to the Plans, and that they be permanently enjoined form violating any provisions of ERISA and from serving as fiduciaries or service providers of any employee benefit plan. On March 20, 1992, the Lattimer-Stevens Company filed a Petition in Bankruptcy.

In January 1992, the defendant was prosecuted for violations of 18 U.S.C. §§ 1027, 1014, and 664. He was convicted, ***inter alia***, of embezzlement from an employee pension benefit plan, and was sentenced by this Court to a term of imprisonment and to pay restitution to the Trustee or Successor Trustee of the Lattimer-Stevens employee pension plans in the

amount of $697,689.90. (Judgement entered June 12, 1992, United States v. Rutledge, CR 92-N-113-S).

II. DISCUSSION

Plaintiff alleges that defendant Rutledge violated §§ 406(a)(1)(B), 406(a)(1)(D) and 406(b)(1) of the Employees Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (ERISA), when as trustee of the Plans, he exchanged Plan assets for a promissory note from the Lattimer-Stevens Company. Section 406 of ERISA, 29 U.S.C. § 1106, provides:

> Sec. 406(a). Except as provided in Section 408:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect --
>
> ***
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> ***

> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> ***
>
> (b) A fiduciary with respect to a plan shall not --
>
> (1) deal with the assets of the plan in his own interest or for his own account,
>
> ***

The defendant, as trustee of the Plans, was a fiduciary within the meaning of 29 U.S.C. § 1002(21)(A), since he exercised control respecting disposition of the Plan assets. Defendant Rutledge, the Lattimer-Stevens Company, and the Rutledge Industrial Corporation were all "parties in interest" as defined in 29 U.S.C. § § 102(14)(A), (C), and (G), respectively. (See Plaintiff's Statement of Undisputed Facts, facts number 1, 4, 15 and 16).

The statute under which the Secretary seeks relief is 29 U.S.C. § 1109(a), which provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the

> responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate....

The defendant argues that judgment in this civil action is barred by the Double Jeopardy Clause of the United States Constitution and that the Secretary of Labor is no longer the proper party to seek a judgment against the defendant, since this Court, in the criminal action, made a finding that the Pension Benefit Guaranty Corporation (PBGC) as the successor trustee to the Plans, was the "victim" to which restitution should be made. The defendant moves to dismiss based on his conviction and the Double Jeopardy Clause.

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed2d 265 (1986). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which

he bears the ultimate burden of proof. Id. at 322-23; see Fed. R. Civ. P. 56(a) and 9(b).

Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. After a properly made motion has been properly responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To avoid summary judgment the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Nevertheless, the evidence of the nonmovant is to be believed and all justifiable

inferences are to be drawn in his favor. Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmovant need not be given the benefit of every inference but only of every reasonable inference. Brown v. City of Clewiston, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

The undisputed evidence in this case and the bank records filed by the plaintiff as Exhibits 4, 5, and 6 establish that the defendant has violated 29 U.S.C. § § 1106(a)(1)(b), (D), and 1106(b)(1), by transferring Plan assets to the Lattimer-Stevens Company and the Rutledge Industrial Corporation, in which the defendant had a substantial equity interest. Cf. Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2nd Cir. 1987); Brock v. Gilliken, 677 F. Supp. 398 (E.D. N.C. 1987); Avakelian v. National Western Life Ins. Co., 680 F. Supp. 400 (D. D.C. 1987). The defendant does not seriously contest the government's argument that he has violated his fiduciary responsibilities under

ERISA; in his Memorandum in Opposition to the plaintiff's motion for summary judgment, he argues only that the Secretary of Labor is not the proper party to seek recovery, and that imposition of the judgment sought would violate the Double Jeopardy Clause.

The Secretary of Labor is specifically empowered by 29 U.S.C. § 1132(a)(2) to seek appropriate relief under 29 U.S.C. § 1109. Additionally, 29 U.S.C. § 1132(a)(5) authorizes the Secretary to bring a civil action for injunctive or other appropriate equitable relief to redress violations or enforce the provisions of ERISA.

The Double Jeopardy Clause prohibits the government from imposing a civil sanction that constitutes punishment when the defendant has already been punished for the same offense. United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). "Under Halper, the double jeopardy claim hinges on whether the civil penalties (1) concerned the same

conduct as the criminal proceedings, and (2) rose to the level of criminal punishment because of the lack of rational relation to the Government's loss." United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir. 1990). The defendant has not produced sufficient evidence in support of his motion to dismiss to demonstrate that the conduct that forms the basis of this civil action is the same conduct for which he was prosecuted. The parties agree, however, that the conduct is the same (Plaintiff's Reply Brief, pp.3-4; Defendant's Brief, p.3). Since this Court has determined that the judgment sought does not rise to the level of criminal punishment, and that the second prong of the Halper test is therefore not met, the outcome would be the same regardless of the state of the evidence eon the issue of whether the civil action is based on the same conduct as the criminal prosecution.

"The Halper Court noted that 'the determination whether a given civil sanction constitutes punishment in the relevant sense

requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.'" United States v. Reed, 937 F.2d 575, 577 (11th Cir. 1991), citing Halper, 490 U.S. at 448. "Where the civil sanction at issue is money damages imposed pursuant to a statutory provision, we are to look to the size of the award to determine whether it is rationally related to the remedial goal of compensating the government for its loss." Id. at 578. 29 U.S.C. § 1109(a), under which the Secretary seeks recovery, is clearly remedial in nature. It provides that fiduciaries who breach their duties "...shall be personally liable to make good to such plan any losses to the plan resulting from each such breach...." The purpose served by the award is that of placing a pension plan in the position it would have been in absent a breach of fiduciary duty by the defendant. The amount sought by the Secretary in this civil action, $680.000.00 plus interest since

March, 1992,[1] as evidenced by the unpaid promissory note, is the amount that the Plans have lost because of the defendant's prohibited transactions. The defendant argues that since he is to pay the Pension Benefit Guaranty Corporation, a wholly owned United States Government corporation, pursuant to the order of restitution, a judgment in favor of the Department of Labor amounts to punishment and violates the Double Jeopardy Clause. (Def.'s Brief, p. 4). The Pension Benefit Guaranty Corporation is, in fact, established within the Department of Labor by 29 U.S.C. § 1302(a). A Judgment in favor of the Secretary, however, will not result in a double recovery. 18 U.S.C. § 3663(e)(2) provides that "[a]ny amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in --(A) any Federal civil proceeding." The Secretary also seeks to have defendant permanently enjoined

[1] The Secretary acknowledges that Mr. Rutledge paid interest on the promissory note until after the time of his conviction in the criminal proceeding.

from serving as a fiduciary or providing services for any ERISA pension or health or welfare plan. "ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligation is sufficient grounds for a permanent injunction." Beck v. Levering, 947 F.2d 639, 641 (2nd Cir. 1991).

The Court concludes that there is no genuine issue of material fact and that the Secretary of Labor is entitled to summary judgment as a matter of law. The defendant's Motion to Dismiss will be denied. Judgment will be entered in favor of the plaintiff and against the defendant W. Eugene Rutledge in the amount of $724,149.25. Further, Mr. Rutledge will be permanently enjoined from serving as a fiduciary or performing services for any ERISA benefit plan.

DONE, this the 15th of October, 1992.

/s/
Edwin L. Nelson
United States District
Judge

Appendix IV

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

W. EUGENE RUTLEDGE, ET AL.,

PLAINTIFFS,

v. CIVIL ACTION NO.
CV-90-N-0484-S

C. RAY DUDLEY, ET AL.,

DEFENDANTS.

FARMERS & MERCHANTS BANK OF
CENTRE, AND F & M REALTY, INC.,

PLAINTIFF,

V. CIVIL ACTION NO.
CV-90-N-0890-S

W. EUGENE RUTLEDGE,

DEFENDANT.

LYNN MARTIN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v. CIVIL ACTION NO. CV-91-N-0114-S

W. EUGENE RUTLEDGE, ET AL.,

DEFENDANTS.

SECOND AMENDED VERIFIED COMPLAINT IN INTERVENTION

National Bank of Commerce of Birmingham ("NBC") hereby states its Second Amended Verified Complaint against C. Ray Dudley, Jr., Stewart Dudley, J. W. Hampton, Merchants Bank. These individuals, along with the Dudleys, shall be referred to in this Complaint as the "Director Group."

5. Cherokee Bancorp is an Alabama corporation that was formed by the Director Group for the purpose of acquiring the stock of Farmers & Merchants Bank, at which time Cherokee Bancorp would become a one-bank holding company.

The Rutledge/Dudley Stock Purchase Agreement

6. On or about January 10, 1990, Rutledge, W. Eugene Rutledge, Jr., and Rutledge Leasing entered into an agreement with the Dudleys (the "Stock Purchase Agreement"), pursuant to which the Dudleys were to purchase for 53.16 million from said persons or entities a controlling interest in Farmers & Merchants Bank, which interest was represented by 19,286 shares of stock issued in the names of Rutledge, W. Eugene Rutledge, Jr. and/or Rutledge Leasing (the "Stock"). A copy of the Stock Purchase Agreement is attached as Exhibit A.

7. The Stock previously had been pledged by the Rutledge or related entities, (collectively, the "Rutledge Entities") to NBC as collateral for debt in the approximate amount of $3.2 million. Rutledge had asked NBC to release its security interest in the Stock to allow him to sell the Stock to a purchaser. NBC agreed with Rutledge to release its security interest in the Stock upon repayment of $2 million of the Rutledge Entities' outstanding debt to NBC.

8. The Dudleys approached NBC in February 1990 and requested that NBC consider financing the acquisition by the Director Group of the Stock (then owned by Rutledge and Rutledge Leasing) under the Stock Purchase Agreement, a copy of which they furnished to NBC. The Dudleys advised NBC at the beginning of the loan negotiations with NBC that they were aware that the Stock was held by NBC as security for loans to Rutledge and related entities. Furthermore, the Stock Purchase Agreement also expressly referred to NBC's lien on the Stock. (See Section 1.02(a)) Discussions regarding the possibility of NBC financing the acquisition culminated in a March 4, 1990 loan commitment letter from NBC (the "Commitment Letter"). The terms of the Commitment Letter were accepted by the Dudleys on March 12, 1990. A copy of the Commitment Letter is attached as Exhibit B.

9. The Dudleys' proposal to NBC, as ultimately reflected in the Commitment Letter, offered as security for the proposed loan the Stock that was to be acquired from Rutledge and Rutledge Leasing,

other Stock of Farmers & Merchants Bank then held by members of the Director Group, the stock of the holding company that was being formed by the Director Group, and the limited personal guaranties of the Director Group.

10. The Commitment Letter provided, among other things, that the financing would be secured by a first-priority security interest in the Stock (Paragraph 6), and it expressly recognized NBC's existing security interest in the Stock, (Paragraph 13). In the Commitment Letter, the Dudleys expressly acknowledged NBC's entitlement to exercise rights in the Stock, and the Dudleys expressly released NBC from all claims and liabilities arising from the exercise of such rights or otherwise relating to NBC's existing security interest. During the loan negotiations, neither the Dudleys, nor anyone acting on behalf of the Director Group, ever disclosed the existence of any dispute or claim affecting NBC's security interest in the Stock.

11. At no time during the course of these loan negotiations did the Dudleys, or anyone acting on behalf of the Director Group, ever assert that either the 1984 Shareholder Agreement between, among others, Mary George Jordan Waite, Rutledge, and C. Ray Dudley (individually and as trustee) (the "1984 Shareholder Agreement"), or that any matters concerning the Lattimer-Stevens Pension Plans would in any way affect the transactions contemplated by the Stock Purchase Agreement or by the Commitment Letter.

12. At no time during the course of these loan negotiations did the Dudleys, or anyone on behalf of the Director Group, ever question the rightful possession by NBC of the Stock.

The Rutledge v. Dudley Lawsuit

13. On March 9, 1990, Rutledge and Rutledge Leasing filed this lawsuit against the Dudleys and NBC, seeking to recover damages for the alleged breach of the Stock Purchase Agreement.

14. NBC counterclaimed against Rutledge and Rutledge Leasing and filed a third-party complaint against certain other Rutledge Entities, seeking to collect on the debt owed by those entities to NBC.

15. NBC and the Rutledge Entities reached a settlement agreement dated June 6, 1990 in this lawsuit, and, by Order dated June 7, 1990, this Court dismissed all claims pending between NBC and the Rutledge Entities. Proxies giving NBC the right to vote the Stock were duly executed and delivered to NBC on June 6, 1990. Pursuant to the settlement and in partial satisfaction of the debt to NBC, on June 25, 1990, Rutledge and Rutledge Leasing transferred to NBC all rights and privileges evidenced by or attributable to the Stock by Agreement dated June 25, 1990. The certificates representing the Stock (which had been in the possession of NBC pursuant to the pledge of the Stock) appeared to be validly issued, bore the corporate seal of Farmers & Merchants Bank, and did not bear a legend of any kind. The Dudleys have repeatedly caused

Farmers & Merchants Bank to refuse to reissue all but 150 shares of the Stock in the name of NBC; recent refusals are evidenced by Exhibits C, D and E. One hundred fifty shares of the Stock currently are in the name of NBC or the NBC Representatives as hereinafter defined.

The Director Group's Efforts
to Issue Voting Preferred Stock

16. On May 3, 1990, the Director Group voted to issue up to 20,000 shares of voting preferred stock, which issuance would have destroyed the control of Farmers & Merchants Bank represented by the Stock and severely damaged NBC's interest in the Stock and its value. This action was taken without the knowledge or consent of NBC.

17. On May 4, 1990, Cherokee Bancorp amended its application with the Federal Reserve Board (the "FRB") to request permission to acquire up to 20,000 shares of voting preferred stock to be issued by Farmers & Merchants Bank. The amended

application states that the voting preferred Stock would be purchased by Cherokee Bancorp for $500,000 cash, at a value of not less than $30.00 per share. The amended application states that "[t]he proposed transaction will result in . . . [Cherokee Bancorp's] **control [of] a majority of the voting shares of the Bank."** (emphasis added).

18. NBC first learned of the proposed dilution of control on or about June 17, 1990, after it had entered into the settlement agreement with Rutledge. NBC filed its first Amended Verified Complaint In Intervention on June 19, 1990. This Court, by Order dated May 9, 1991, has directed the Dudleys not to cause Farmers & Merchants Bank to issue any stock without notice to all parties and to the Court. (May 9, 1990 Order at 6).

The NBC/Dudley Stock Purchase Agreement

19. Immediately after the filing of NBC's Verified Complaint in intervention. the Dudleys approached NBC seeking to resolve matters by a sale to Cherokee Bancorp of the Stock. Those

discussions culminated in NBC, the Director Group, and Cherokee Bancorp entering into a Stock Purchase Agreement dated August 31, 1990 (the "Dudley Stock Purchase Agreement"). A copy of the Dudley Stock Purchase Agreement is attached as Exhibit F. During these discussions, the Dudleys repeatedly assured NBC that it was not their intent to issue any stock that would dilute NBC's interest in Farmers & Merchants Bank. In the Dudley Stock Purchase Agreement, the Dudleys expressly agreed not to issue such stock unless required to by regulatory authorities and, in any event, without allowing NBC to purchase its pro rata share (namely, approximately 55 percent) of the new stock. In the Dudley Stock Purchase Agreement, Cherokee Bancorp agreed to purchase the stock for $2 million, or approximately $103.71 per share, with NBC providing favorable nonrecourse financing to fund the acquisition price.

20. Among other things, Cherokee Bancorp and the Director Group agreed in the Dudley Stock Purchase Agreement to:

a. use their best efforts to obtain regulatory and governmental approvals necessary to consummate the transaction (1 5.1(b));

b. operate and manage Farmers & Merchants Bank in a sound and prudent manner (1 5.1(c));

c. cooperate fully with NBC and use their best efforts to consummate the Agreement (1 5.1(c)).

d. to cause Farmers & Merchants Bank to employ James F. Beall and G. Ruffner Page, Jr. (the "NBC Representatives") at all times prior to the closing of the sale and purchase of the Stock as consultants to the Board of Directors of Farmers & Merchants Bank with full access to all books and records of said board and Farmers & Merchants Bank. The Dudley Stock Purchase Agreement was

conditioned upon Cherokee Bancorp obtaining regulatory approval from the FRB to become a bank holding company.

21. Notwithstanding repeated requests by and on behalf of the NBC Representatives to attend meetings of the Board of Directors of Farmers & Merchants Bank, after entering into the Dudley Stock Purchase Agreement, the Dudleys continued to schedule meetings of the Board of Directors and did not advise the NBC Representatives of the dates of said meetings. The NBC Representatives were allowed to attend only one meeting of the Board of Directors during the four-month period between August 31, 1990 and January 9, 1991, when the NBC Representatives were elected to the Board of Directors. NBC's Complaint in Intervention was held in abeyance by the Court upon NBC's request, following an agreement by the Dudleys to permit NBC to purchase its pro rata share of any new stock issued.

22. In November 1990, NBC learned that the legal expenses of the Dudleys associated with their attempts to obtain control of Farmers & Merchants Bank had been paid by Farmers & Merchants Bank. It also appeared that legal expenses of the Directors relating to obtaining regulatory approval of Cherokee Bancorp's acquisition of Farmers & Merchants Bank stock had been paid by Farmers & Merchants Bank. In addition, NBC learned that Farmers & Merchants Bank was paying salaries to the Dudleys in the amount of $2,000 per month and was paying a retainer of $2,000 per month to defendant Al Shumaker, one of the Director Group. By letter dated November 20, 1990, attached hereto as Exhibit G. NBC objected to these matters.

23. On information and belief, in violation of their obligations under the Dudley Stock Purchase Agreement, in November 1990 and thereafter, the Dudleys contacted the Mary George Waite Estate and the Department of Labor for the purpose of soliciting lawsuits against NBC challenging NBC's title to the

Stock. More recently, NBC is informed that the Department of Labor will not concede to the Dudleys' attempts to pressure them into filing suit against NBC, and that the Dudleys are now contacting beneficiaries of the Lattimer Stevens Trust for the purpose of soliciting a lawsuit against NBC challenging NBC's title to the Stock.

24. In December 1990, it appeared that Cherokee Bancorp would not receive regulatory approval unless the Dudley Stock Purchase Agreement was modified to provide for more favorable financing. During December 1990 and January 1991, NBC met with the Dudleys and representatives of the Burr & Forman law firm to negotiate an agreement to facilitate regulatory approval.

25. On December 3, 1990, Burr & Forman attorney Vic Hayslip presented a tentative settlement proposal to NBC. NBC understood the proposal to tie resolution of Farmers & Merchants Bank's claims to a settlement of the Dudleys' individual claims, and involved the potential of a significant write-off by NBC. Although

Mr. Hayslip later denied that the proposal tied resolution of Farmers & Merchants Bank's claims to a settlement of other claims, the settlement of one dispute was contingent upon the settlement of the other.

26. By letter dated December 7, 1990, a copy of which is attached hereto as Exhibit H, NBC raised with Burr & Forman the fact that Burr & Forman and the Miller, Hamilton, Snider & Odom firm had apparent conflicts of interest arising from those firms' representation of the Director Group and/or Cherokee Bancorp at the same time the firms represented Farmers & Merchants Bank.

27. By letter dated December 18, 1990, a copy of which is attached hereto as Exhibit I, the Burr & Forman law firm replied that, before making a decision about what action the firm should take, the firm needed to discuss the matter with Louis Anders. who was out of the country until December 20, 1990.

28. On January 15, 1991, NBC executed an Amendment to the Dudley Stock Purchase Agreement extending the terms of that

Agreement. A copy of the Amendment is attached as Exhibit J. In the January 15 Amendment, the parties specifically agreed that NBC had identified several matters that, in the opinion of NBC, constituted or may have constituted a breach of the Dudley Stock Purchase Agreement. Cherokee Bancorp and the Director Group agreed in the Amendment that no action or inaction of NBC would constitute a waiver of NBC's rights to insist on compliance with the Dudley Stock Purchase Agreement or of any other rights NBC might have.

The 1991 Annual Stockholders Meeting

29. On January 9, 1991, the Annual Meeting of Shareholders of Farmers & Merchants Bank was held. At the meeting, Rutledge attempted to vote the shares of the Stock and attempted to take other corporate action. Defendant Al Shumaker, the Inspector appointed by the Board of Directors of Farmers & Merchants Bank, concluded that NBC had the right to vote the Stock, although the Dudleys entered a "personal" objection.

30. Farmers & Merchants Bank filed a Motion for Temporary Restraining Order, which was converted into a Motion for Preliminary Injunction with this court in Case No. CV-90-H-484-S. By Order entered January 17, 1991, this Court confirmed that the proxies executed by the Rutledge Entities in favor of NBC were valid. The Rutledge Entities were enjoined from exercising any voting rights in the Stock. A copy of the January 17, 1991 Order is attached as Exhibit K.

Federal Reserve Board
Denial of Cherokee's Application

31. On March 4, 1991, the FRB denied the application of Cherokee Bancorp to become a bank holding company. A copy of the press release and order denying the formation of the bank holding company is attached as Exhibit L. The FRB noted therein that Farmers & Merchants Bank is "in weakened financial condition and is in need of financial and managerial support." (FRB Order at 2). The FRB also noted that "current management," which would include the Dudleys and the Director Group, "has not demonstrated that it can provide the improvement in the performance of the bank necessary to support the debt contemplated by the this proposal." (Id. at 3). Accordingly, the FRB denied the application.

32. The Dudleys continued to assure NBC that they were considering ways to restructure the transaction in a manner that would facilitate regulatory approval, after the denial of their application with the FRB. Counsel for the Dudleys informed NBC

that the FRB had indicated that approval might be obtained if the holding company incurred no acquisition debt and the directors replaced management.

33. In March 1991, it became obvious to NBC that the Dudleys were making no attempt to make the changes necessary to obtain regulatory approval so that the Stock could be transferred to the Dudleys. Representatives of NBC met with each of the members of the Director Group, with the exception of the Dudleys, in an effort to persuade them to replace Ray Dudley as Chairman of the Board. The Director Group members refused, indicating that Ray Dudley did not think that NBC owned a majority of the stock of Farmers & Merchants Bank and that the matter of stock ownership should be resolved outside the Board of Directors.

34. At this point it was clear to NBC that the Dudleys and the Director Group could not purchase the stock from NBC because they could not obtain regulatory approval. It was also clear that the Dudleys would not voluntarily allow NBC to exercise its rights as

owner of the Stock and thus, for NBC to exercise its rights, resort to the courts would be necessary. Because NBC felt that more litigation was not in the best interest of Farmers & Merchants Bank or its shareholders, NBC offered to purchase the Dudleys' stock in an attempt to resolve the issues without litigation. NBC's offer was not accepted.

35. By letter dated April 18, 1991, a copy of which is attached as Exhibit M. NBC informed the Director Group and Cherokee Bancorp that they were in default under the Dudley Stock Purchase Agreement, and gave the Director Group and Cherokee Bancorp 10 days to cure said default.

36. By letter dated May 2, 1991, NBC terminated the Dudley Stock Purchase Agreement without prejudice to NBC's rights thereunder or otherwise. A copy of the May 2, 1991 letter is attached as Exhibit N.

Events Following Termination of the Dudley Stock Purchase Agreement

37. By letter dated May 8, 1991, a copy of which is attached as Exhibit O, NBC again raised with Burr & Forman the apparent conflict of interest. Burr & Forman once again requested that it be given time to consider the conflict issue, citing the travel schedules of several partners of that firm.

38. Following the May 8, 1991 letter, Burr & Forman continued to attempt settlement of Farmers & Merchants Bank's claims as a part of a comprehensive settlement of claims against the Dudleys, Dudley, Hopton-Jones, Sims & Freeman, and the Director Group. NBC repeatedly objected to the attempt to tie resolution of those claims to resolutions of claims of or against Farmers & Merchants Bank.

39. The Dudleys have indicated to NBC that they would challenge any effort to call a special shareholder meeting and that NBC would not be allowed to vote the Stock at such a meeting.

40. In November 1990, Burr & Forman orally informed NBC that all of its fees had been paid by Farmers & Merchants Bank. In April 1991, Burr & Forman orally informed NBC that it continued to believe that payment of its fees by Farmers & Merchants Bank was appropriate. On May 28, 1991, defendant Al Shumaker, counsel to Farmers & Merchants Bank and a member of the Director Group, orally stated that he thought that all of the fees that had been paid to Burr & Forman had been paid by Farmers & Merchants Bank.

41. Despite repeated requests from NBC for an accounting of fees paid by Farmers & Merchants Bank, NBC has not received such an accounting. On information and belief, Farmers & Merchants Bank has paid all fees to Burr & Forman for all Dudley-related matters, including the negotiation by Cherokee Bancorp, the Dudleys, and the other directors with NBC for the purchase of the Stock. On information and belief, the legal fees paid

by Farmers & Merchants Bank to the Burr & Forman firm are in excess of $400,000.

42. Such payments are quickly draining Farmers & Merchants Bank, a relatively small bank with approximate assets of only $34 million and which reported a 1990 fiscal year end loss of approximately $700,000, of its assets. The Director Group's use of funds for the Dudleys' own purposes poses an Imminent threat to the stability and safety of the bank and its deposits.

43. Farmers & Merchants Bank has sued Rutledge and Rutledge Entities in state and federal court. The litigation undertaken by Farmers & Merchants Bank against Rutledge and the Rutledge Entities is not in the best interest of Farmers & Merchants Bank and is not consistent with sound and prudent banking practices in that it is draining Farmers & Merchants Bank of management resources and funds and, in light of Rutledge's financial condition, is not likely to result in a recoverable judgment. The litigation is being maintained to obtain leverage over Rutledge in connection with claims made by

Rutledge against the Dudleys personally. But for the Dudleys' use or the Farmers & Merchants Bank's litigation to advance their own personal interests, the Farmers & Merchants Bank litigation could be resolved.

44. By letter dated May 28, 1991, a copy of which is attached hereto as Exhibit P. Burr & Forman responded to NBC that it did not believe that a conflict of interest existed.

Demands on the Board of Directors of Farmers & Merchants Bank

45. By letter dated May 16, 1991, Mr. Thomas S. Graves made demand on the Board of Directors of Farmers & Merchants Bank to initiate legal action against all current directors and all persons who have served as director for the past seven years. Mr. Graves' demand was based upon, among other things, a conflict of interest arising from the representation of Farmers & Merchants Bank by the Burr & Forman law firm, and the payment of fees by

Farmers & Merchants Bank to that firm. A copy of that letter is attached as Exhibit Q.

The May 28, 1991 Board of Directors Meeting

46. On May 28, 1991, the Board of Directors for Farmers & Merchants Bank met. At that time, another letter from Mr. Thomas S. Graves, a copy of which is attached hereto as Exhibit R was given to the NBC Representatives. NBC continued to be concerned that the Director Group members other than the Dudleys had not received information and advice about the obligations and duties of the Bank, except for the representations made to them by the Dudleys and Burr & Forman. Therefore, the NBC Representatives delivered to each member of the Director Group a letter setting forth the conflicts and requesting the Director Group take the following actions:

a. terminate the employment of the Burr & Forman firm;

b. require the Burr & Forman firm to withdraw from representing the Dudleys in matters substantially related to that firm's representation of Farmers & Merchants Bank;

c. employ independent counsel to investigate the allegations of Mr. Graves' May 16, 1991 letter;

d. direct the appropriate officers of Farmers & Merchants Bank to register the Stock in the name of NBC; and

e. remove Ray Dudley, Jr. as Chairman of the Board. The letter also urged the members of the Director Group to consult independent counsel. A copy of the May 28, 1991 letter is attached as Exhibit E.

47. As part of the discussions at the May 28, 1991 meeting, Chairman Ray Dudley assured the Directors that he would

not resolve his problems with NBC by sale or the Dudleys' stock to NBC unless NBC also agreed to purchase the Director Group's shares for an equivalent purchase price. The Director Group then voted, over the dissenting votes of; the NBC Representatives, not to take any of the actions requested by NBC.

48. At the May 28, 1991 meeting, the Director Group passed, over the dissenting votes of the NBC Representatives, a resolution purporting to waive the Burr & Forman conflict of interest arising from that firm's representation of multiple parties with adverse interests. The resolution read as follows:

> RESOLVED, that the Board of Directors of the Farmers & Merchants Bank, a corporation, Centre, Alabama, hereby reaffirms the appointment and designation of the law firm of Burr & Forman of Birmingham, Alabama, to represent the Bank in certain litigation presently pending in the U.S. District Court in Birmingham and in the Circuit

Court of Jefferson County, Alabama, and in which litigation, W. Eugene Rutledge or his related interests are parties;

RESOLVED FURTHER, that the Board of Directors of the Farmers & Merchants Bank, a corporation, Centre, Alabama, hereby expressly waives any conflict of interest which may exist in the representation of the Bank's interests in such litigation and the representation of C. Ray Dudley, Stewart Dudley or the accounting firm of Dudley, Hopton-Jones, Sims & Freeman by Burr & Forman.

49. The resolutions set out in the preceding paragraph were ineffective since all members of the Board of Directors who voted in favor of the resolution were interested directors in that Burr & Forman represented each of the Directors personally. Messrs. Beall and Page objected on those grounds. NBC remains concerned that

the members of the Director Group other than the Dudleys still have not received independent counsel concerning their legal obligations as directors.

50. NBC offers to do equity.

WHEREFORE, NBC seeks the following relief:

COUNT ONE

51. NBC adopts the preceding paragraphs and incorporates them by reference as if set out fully herein.

52. Because of the wrongful acts complained of, NBC is without adequate legal remedy.

WHEREFORE NBC seeks an order restraining and enjoining C. Ray Dudley, Jr., Stewart R. Dudley, J. W. Hampton, Joe Hicks, Travis James, Jack Jennings, Richard Lindsay, Sandra Sentel, Al Shumaker, and Cherokee Bancorp as follows:

a. From acquiring any newly issued voting stock in Farmers & Merchants Bank;

b. From exercising their positions as members of the board of directors of Farmers & Merchants Bank so as to cause said bank to issue any additional capital stock without stockholder approval:

c. From promoting their personal financial interest at the expense of NBC and of other stockholders in Farmers & Merchants Bank;

d. From causing Farmers & Merchants Bank to expend monies to fund litigation that is being maintained for the personal benefit of the Dudleys and the Director Group and not for the benefit of Farmers & Merchants Bank;

e. From causing Farmers & Merchants Bank to pay the attorneys' fees of Burr & Forman for work done in connection with this litigation;

f. From causing Farmers & Merchants Bank to otherwise pursue litigation that is being maintained for the personal benefit of the Dudleys and the Director Group and not for the benefit of Farmers & Merchants Bank;

g. From interfering with NBC's ownership of the Stock or with the transfer of ownership of Stock to NBC on the stock ledger of Farmers & Merchants Bank; and

h. Such other and further injunctive relief as this Court deems proper.

COUNT TWO

53. NBC adopts the preceding paragraphs and incorporates them by reference as if set out fully herein.

54. Because of the wrongful acts complained of, NBC is without adequate legal remedy.

55. Because of the defendants' interpretations of the various agreements, statutes, and regulatory rules that govern this case, there exists an actual justiciable controversy upon which substantial property rights are dependent.

WHEREFORE, NBC seeks a declarative judgment that:

a. Farmers & Merchants Bank is required to transfer the Stock on the stock ledger book of Farmers & Merchants Bank to NBC's name and to issue stock certificates in the name of NBC;

b. NBC is entitled to call a special shareholder's meeting of Farmers & Merchants Bank;

c. NBC is entitled to vote the Stock at the special shareholder's meeting;

d. The 1984 Agreement has been waived by the Dudleys, is unenforceable by the Dudleys and has been affirmatively released by the Dudleys; and

e. Such other and further affirmative relief as this Court deems proper.

COUNT THREE

56. NBC adopts the preceding paragraphs and incorporates them by reference as if set out fully herein.

57. The wrongful refusal of defendants C. Ray Dudley, Stewart Dudley, J. W. Hampton, Joe Hicks, Travis lames, Jack Jennings, Richard Lindsay, Sandra Sentel, and Al Shumaker to reissue the Stock in the name of NBC constitutes willful and wrongful conversion of that Stock. NBC has been injured as a proximate result of such conversion.

WHEREFORE, NBC demands judgment against C. Ray Dudley, Stewart Dudley, J. W. Hampton, Joe Hicks, Travis James, Jack Jennings, Richard Lindsay, Sandra Sentel, and Al Shumaker for compensatory damages in the amount to be determined and punitive damages in the amount of $5,000,000.

COUNT FOUR

58. NBC adopts the preceding paragraphs and incorporates them by reference as if set out fully herein.

59. The actions of the defendants constitute a breach of the Dudley Stock Purchase Agreement. NBC has been injured as a proximate result of such breach of contract.

WHEREFORE, NBC demands judgment against C. Ray Dudley, Stewart Dudley, J. W. Hampton, Joe Hicks, Travis James, Jack Jennings, Richard Lindsay, Sandra Sentel, Al Shumaker, and Cherokee Bancorp for compensatory damages in an amount to be determined.

COUNT FIVE

60. NBC adopts the preceding paragraphs and incorporates them by reference as if set out fully herein.

61. At all times relevant to this action, NBC has owned shares of stock in Farmers & Merchants Bank. As record owner of 130 shares of Farmers & Merchants Bank and as owner of an

additional 19,135 shares that are not currently registered in NBC's name due to the wrongful actions of the Dudleys, NBC brings this action as a shareholder of Farmers Merchants Bank against the Director Group.

62. NBC made demand in its May 28, 1991 letter to the Director Group to investigate the matters and to take steps to protect the rights of Farmers & Merchants Bank. The Director Group declined to take any action or to otherwise take steps to protect the interest of Farmers & Merchants Bank and its shareholders.

63. NBC will fairly and adequately represent the interests of the shareholders similarly situated and the interests of Farmers & Merchants Bank in initiating and maintaining this action.

64. The wrongful acts of defendants C. Ray Dudley, Stewart Dudley, J. W. Hampton, Joe Hicks, Travis James, Jack Jennings, Richard Lindsay, Sandra Sentel, and Al Shumaker constitute a breach of their fiduciary duty to NBC and the other shareholders of

Farmers & Merchants Bank. NBC and the other shareholders have been injured as a proximate result of such breach of fiduciary duty.

WHEREFORE, NBC, in its capacity as a shareholder of and on behalf of Farmers & Merchants Bank, demands judgment in favor of Farmers & Merchants Bank and against C. Ray Dudley, Stewart Dudley, J. W. Hampton, Joe Hicks, Travis James, Jack Jennings, Richard Lindsay, Sandra Sentel, Al Shumaker, and Cherokee Bancorp as follows:

a. compensatory damages in an amount equal to the funds wrongfully paid by Farmers & Merchants Bank to the Burr & Forman law firm in compensation for services performed for other entities;

b. compensatory damages in the amount within the jurisdiction or this Court for any and all other damages suffered by Farmers & Merchants Bank as a proximate result of the wrongful actions or the defendants;

c. an accounting of all legal fees and expenses paid by Farmers & Merchants Bank in connection with the facts underlying this action;

d. a reasonable attorneys' fee and expenses for counsel for NBC; and

e. such other and further relief to which Farmers & Merchants Bank, NBC, and other stockholders similarly situated may be entitled.

NBC further requests that this Court align and add Farmers & Merchants Bank as a party plaintiff to this Second Amended Verified Complaint In Intervention.

/s/ (LMD)
Fournier J.Gale III

/s/ (LMD)
Cathy S. Wright

/s/ (LMD)
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/s/
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VERIFICATION

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

G. Ruffner Page, being duly sworn, says:

I am an Executive Vice President for National Bank of Commerce of Birmingham. I am duly authorized to make this verification. I am informed and believe and on the basis of personal knowledge and such information and belief, state that the facts stated in the foregoing Second Amended Verified Complaint in Intervention are true and correct.

/s/
G. Ruffner Page

Sworn and subscribed to before me this the 7th day of June, 1991.

/s/ Rhonda B. Toombs
NOTARY PUBLIC

My Commission Expires
4/1/92

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served by United States Mail, first class, postage-prepaid to the following on this 7th day of June, 1991:

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Supreme Court, U.S.
FILED
FEB 24 1994
OFFICE OF THE CLERK

No. 93-950

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM EUGENE RUTLEDGE, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's Double Jeopardy Clause prohibits a district court from ordering equitable and remedial relief against a fiduciary for breach of duty under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, because the breaches have previously resulted in a criminal conviction, partial debarment order, and order of restitution against the fiduciary.

2. Whether the Secretary of Labor retains his standing under Section 502(a) of ERISA, 29 U.S.C. 1132(a), to pursue an action against a fiduciary for breaches resulting in plan losses, after the Pension Benefit Guaranty Corporation terminates the pension plans at issue and becomes their trustee pursuant to statute.

3. Whether the United States has waived its sovereign immunity to suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, when the government files a civil ERISA action and the defendant alleges in a counterclaim for RICO damages that the government's pre-suit investigation amounted to racketeering activity.

4. Whether the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, provides for suppression of financial records pertaining to pension plans that the government has obtained without prior authorization from the plans' fiduciary.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-950

WILLIAM EUGENE RUTLEDGE, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam order of affirmance of the court of appeals (Pet. App. II) is unreported. The opinion of the district court (Pet. App. III) is reported at 807 F. Supp. 693.

JURISDICTION

The court of appeals entered its judgment on July 7, 1993. The petition for rehearing was denied on September 8, 1993. Pet. App. I. The petition for a writ of certiorari was filed on November 1, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984 petitioner William E. Rutledge obtained control of the Lattimer-Stevens Company, and from that date until January 1990 he served as trustee of the company's two pension plans. Pet. App. III, at 2-3. Those plans were subject to the Employee Retirement Income Security Act of 1974 (ERISA), and petitioner was a fiduciary under that Act. Pet. 2; Pet. App. III, at 6. ERISA required petitioner to discharge his duties with respect to the plans solely in the interest of plan participants and beneficiaries and with a high degree of prudence. 29 U.S.C. 1104(a)(1) (1988 & Supp. IV 1992). ERISA also prohibited petitioner from dealing with plan assets in his own interest or causing the plans to engage in direct or indirect transactions with a "party in interest," a term that includes petitioner, the Lattimer-Stevens Company, and other corporations that petitioner controlled. Pet. App. III, at 5-6; see 29 U.S.C. 1002(14)(A), (C) and (G), 1106(a) and (b)(1).

In February 1988, petitioner made a deposit of $178,426 from the plans to the Lattimer-Stevens bank account. Pet. App. III, at 3. On September 21 of that year, he deposited to the company's account an additional $175,000 from the sale of a plan certificate of deposit. *Ibid.* On December 6, 1988, petitioner signed a check transferring $260,000 from one of the plans to Rutledge Industrial, a company in which he owned a controlling interest. *Ibid.* By January 1990, when petitioner sold the companies and the plans obtained a successor trustee, the plans' sole asset was a promissory note from Lattimer-Stevens for $680,000, at 10% annual interest, personally guaranteed by petitioner. *Id.* at 3-4. Lattimer-Stevens filed for

bankruptcy in March 1992 and did not repay the note. *Id.* at 4, 14.

2. In 1990 the Department of Labor investigated petitioner's activities as the plans' trustee. In January 1991, the Secretary filed a five-count complaint under ERISA, see Pet. App. III, at 4, alleging that in 1984 and 1985 petitioner had used plan assets to further his efforts to gain control of the Farmers & Merchants Bank of Centre, Alabama (F & M Bank), and to secure loans to himself and corporations that he controlled, and that he had made imprudent, undiversified investments on the plans' behalf. Record Excerpts (R.E.) Doc. 1. Those actions were alleged to have breached petitioner's fiduciary duties under Section 404(a)(1) of the Act, 29 U.S.C. 1104(a)(1), and to have constituted prohibited transactions in violation of Sections 406(a) and (b), 29 U.S.C. 1106(a) and (b). *Ibid.* The Secretary sought, *inter alia*, restitution of all losses to the plans, and a permanent injunction barring petitioner from serving as an ERISA fiduciary or service provider. Pet. App. III, at 4.

Petitioner responded to the complaint by suing a number of third parties, see Pet. App. IV, and by filing a counterclaim against the Secretary. R.E. Doc. 51. Counts one and two of the counterclaim alleged that in the investigation that preceded this suit, the Secretary had obtained petitioner's personal financial records from F & M Bank in violation of the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq.*, and had used those records to sue him. R.E. Doc. 51, at 2-5. Counts three and four of the counterclaim alleged that the Department of Labor had violated the Racketeer Influenced and Corrupt

Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, by engaging in racketeering activity with Stewart R. Dudley, a director of the F & M Bank and the plans' accountant (Pet. 4, 23, 50), with the purpose of defrauding petitioner through illicit receipt of his bank records. R.E. Doc. 51, at 6-8. In July 1991, the Secretary amended the complaint to add a sixth claim, alleging that petitioner, in violation of Section 406(a) and (b) of ERISA, had transferred most, if not all, of the plans' remaining assets to Lattimer-Stevens in 1988, in exchange for the promissory note described above. R.E. Doc. 85, at 11-13. Again, the Secretary sought restitution to the plans for the losses caused by this transaction, as well as a permanent injunction barring petitioner from serving as an ERISA fiduciary or service provider. *Id.* at 13-14.

3. In April 1992, after a jury had convicted petitioner on criminal charges of embezzlement from the plans and making false statements,[1] the district

[1] The jury convicted petitioner in February 1992 on two counts of embezzlement that involved his transfer of $175,000 and $260,000 from the plans to companies he controlled (see Pet. 20) and six counts of making false statements on loan applications involving the plans and on annual reports to the government concerning plan transactions (see Pet. 20). Pet. App. III, at 4. Although the jury acquitted petitioner of embezzling $178,426 from the plans (see Pet. 6-7), the district judge, who also presided over the civil proceedings in this case, found at petitioner's sentencing that the transfer of those funds from the plan to Lattimer-Stevens had occurred as alleged in February 1988. Pet. 21. The court subsequently sentenced petitioner to a term of imprisonment and ordered him to pay restitution to the plans of $697,689.90, an amount that represented the plans' losses on the unpaid promissory note, including interest to the date of sentencing. Pet. 8; Pet. App. III, at 4-5. The criminal conviction and sentence are pending on

court granted the Secretary's motion for summary judgment on Counts 1 and 2 of petitioner's counterclaim, which alleged violations of the Right to Financial Privacy Act. R.E. Doc. 128, at 1-2; see Pet. 7. The court concluded that the government had not violated the RFPA because it "sought and obtained only the records of Lattimer-Stevens Pension Plans," rather than petitioner's personal records, and that the RFPA does not in any event authorize suppression of records illegally obtained, the relief that petitioner had sought. R.E. Doc. 128, at 2.[2] The district court also dismissed counts three and four of petitioner's counterclaim, which alleged violations of RICO. It reasoned that "[t]he United States of America and the United States Department of Labor are immune from suits for damages" under RICO. *Ibid.*

In June 1992, petitioner was sentenced in the criminal proceedings, see note 1, *supra*, and the Pension Benefit Guaranty Corporation (PBGC) then terminated and became trustee of the Lattimer-Stevens plans pursuant to Section 4042(c) of ERISA, 29 U.S.C. 1342(c). Pet. 8. In July 1992, after the PBGC termination, the Secretary moved for summary judgment

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appeal. *United States* v. *Rutledge*, No. CR 92-N-113-S (N.D. Ala. 1992), appeal pending, No. 92-6548 (11th Cir.).

[2] In a subsequent memorandum opinion the district court explained that the RFPA protects only the records of "customers," and a customer under the statute is "any person or authorized representative of that person." Mem. Op. 2-3 (Apr. 22, 1992) (citing 12 U.S.C. 3401(5)). Since a person for RFPA purposes is only an "individual or partnership of five or fewer individuals," Mem. Op. 3 (citing 12 U.S.C. 3401(4)), the court concluded that the statute does not protect the records of employee benefit plans. Mem. Op. 3.

on Count 6 of his amended complaint concerning the 1988 transfer of plan assets in exchange for the $680,000 promissory note. *Id.* at 8-9. Petitioner moved to dismiss on the theory that entry of judgment following his criminal conviction would violate the Double Jeopardy Clause of the Fifth Amendment. He also argued that the PBGC rather than the Secretary was the proper party to seek recovery. Pet. App. III, at 7, 11.

In October 1992, the district court granted summary judgment in favor of the Secretary. Pet. App. III, at 1-16. The court pointed to the three transfers of plan assets to companies controlled by petitioner—$178,426 to Lattimer-Stevens in February 1988, $175,000 to the same company in September 1988, and $260,000 in December 1988 to Rutledge Industrial—and concluded that "[t]he undisputed evidence in this case * * * establish[es] that the defendant has violated 29 U.S.C. §§ 1106(a)(1)[(B)], (D), and 1106(b)(1), by transferring Plan assets to [companies] * * * in which [he] * * * had a substantial equity interest." Pet. App. III, at 10. The court observed that petitioner "d[id] not seriously contest * * * that he ha[d] violated his fiduciary responsibilities under ERISA" by causing the plans to engage in these prohibited transactions. *Id.* at 10-11. The court also rejected petitioner's argument that the Secretary was not the proper party to sue, explaining that Sections 502(a)(2) and (5) of ERISA specifically authorize the Secretary "to seek appropriate relief under 29 U.S.C. § 1109" and to "bring a civil action for injunctive or other appropriate relief to redress violations or enforce the provisions of ERISA." Pet. App. III, at 11.

The court also rejected petitioner's double jeopardy claim. It acknowledged that under *United States* v. *Halper*, 490 U.S. 435 (1989), "[t]he Double Jeopardy Clause prohibits the government from imposing a civil sanction that constitutes punishment when the defendant has already been punished for the same offense." Pet. App. III, at 11. But the court concluded that although the parties agreed that the conduct underlying the criminal and civil cases was the same, the civil judgment "d[id] not rise to the level of criminal punishment." *Id.* at 12. The court noted that the Secretary sought recovery under Section 409(a) of ERISA, 29 U.S.C. 1109(a), a "clearly remedial" provision that makes fiduciaries "personally liable" for any plan losses occasioned by their breaches. Pet. App. III, at 13. Moreover, in the court's view, the size of the award was remedial because it represented "the amount that the Plans have lost because of the defendant's prohibited transactions." *Id.* at 14.[3] The court also noted that despite the restitution order previously entered in the criminal proceedings (see note 1, *supra*), the judgment in the civil proceedings would not result in a double recovery because under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663(e)(2), "[a]ny amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in * * * any Federal civil proceeding." Pet. App. III, at 14.

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[3] The court calculated the losses as $680,000, "as evidenced by the unpaid promissory note," and added unpaid interest through October 1992. Pet. App. III, at 13-14 & n.1. Thus, the court ordered petitioner to pay $724,149.25. *Id.* at 15.

Finally, the district court granted the Secretary's request for a permanent injunction barring petitioner from service as an ERISA fiduciary. It noted the high standard that ERISA imposes upon fiduciaries and concluded that "serious misconduct that violates statutory obligation is sufficient grounds for a permanent injunction." Pet. App. III, at 15 (citing *Beck* v. *Levering*, 947 F.2d 639, 641 (2d Cir. 1991), cert. denied, 112 S. Ct. 1937 (1992)). The court entered its October 1992 judgment as a final order under Fed. R. Civ. P. 54(b) (Rec. Vol. 2, No. 144 (R2-144), at 2), and petitioner appealed.[4]

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. II.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court therefore is not warranted.

1. Petitioner does not dispute that he violated ERISA by transferring hundreds of thousands of dollars in plan assets to companies he controlled. Nor is there any dispute that he left the plans with no assets except a now worthless $680,000 promissory note from one of petitioner's companies. Pet. App. III, at 10-11. Instead, he argues that because the district court's October 1992 judgment followed his criminal convictions, it violated the Double Jeopardy Clause of

[4] On February 12, 1993, the district court dismissed with prejudice all pending claims by petitioner against the third parties he had sued and dismissed the Secretary's remaining claims against petitioner without prejudice to the Secretary's right to request reinstatement in the event that the court's order on summary judgment is reversed.

the Fifth Amendment as construed in *United States* v. *Halper*, 490 U.S. 435 (1989). Neither the restitutionary order nor the permanent injunction, however, implicates any of the double jeopardy concerns identified in *Halper*.

The Double Jeopardy Clause[5] "protects against multiple punishments for the same offense." *Schiro* v. *Farley*, No. 92-7549 (Jan. 19, 1994), slip. op. 7 (quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969)). In *Halper*, this Court held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction * * * that * * * may not fairly be characterized as remedial, *but only as a deterrent or retribution*." 490 U.S. at 448-449 (emphasis added). The Court stressed, however, that it was announcing "a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. The Court recognized that in the ordinary case, "fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole," because the government's damages are often difficult if not impossible to calculate and the government is entitled to rough remedial justice. *Id.* at 446, 449.

In this case, the monetary award is in no way "overwhelmingly disproportionate" to the damages petitioner caused. In fact, it corresponds exactly to the plans' losses, as the district court calculated

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[5] The Double Jeopardy Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

them, and therefore is plainly remedial. See *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985) (monetary relief under Section 409(a) is available only to the plan). Petitioner's argument that the award is "penal" is nothing more than a disagreement with the district court's calculation of the amount of the plans' losses. We see no error in those calculations,[6] and in any event, the calculation of losses is a fact-bound issue that does not warrant this Court's attention. Nor does the remedial award become penal on the theory (Pet. 25) that the award adds nothing to the order of restitution imposed in the criminal proceedings against petitioner. The award ensures that the government can recover plan losses, while at the same time avoiding any double recovery against petitioner.[7] Whether or not this added method

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[6] Although petitioner now claims (Pet. 21) that the plans lost only $613,000 as a result of his misconduct, he himself submitted as evidence, in opposition to the Secretary's motion for summary judgment in this case, the trial court's determination at sentencing that the plans had lost at least $680,000 during the time in which petitioner was trustee. R2-140, Exh. 2, at 5.

[7] Petitioner does not dispute that under the Victim and Witness Protection Act, 18 U.S.C. 3663(e)(2)(A), any restitutionary amount paid to a victim in a criminal proceeding must be set off against any amount the Secretary later recovers under ERISA. See Pet. 25; Pet. App. III, at 14; *United States* v. *Fliegler*, 756 F. Supp. 688, 695 (E.D.N.Y. 1990); *United States* v. *Loesche*, 688 F. Supp. 649, 651 (Ct. Int'l Trade 1988); *Teachers Ins. & Annuity Ass'n* v. *Green*, 636 F. Supp. 415, 418 (S.D.N.Y. 1986); cf. *Beck* v. *Levering*, 947 F.2d 639, 642 (2d Cir. 1991) (no double recovery where Secretary and private plaintiffs win judgment against plan asset managers; amount won by Secretary "merely decreases the amounts recouped by

of recovery is, from petitioner's perspective, a sanction that "carr[ies] the sting of punishment" is immaterial to a determination of its purpose. *Halper*, 490 U.S. at 447 n.7.

Petitioner also errs in arguing (Pet. 26-28) that the permanent injunction barring him from serving as an ERISA fiduciary or service provider constitutes a second punishment that subjects him to double jeopardy. The purpose of such an injunction under Section 409 of ERISA, which authorizes the court to impose "such * * * equitable or remedial relief as [it] * * * deem[s] appropriate," 29 U.S.C. 1109(a), is not to punish, but to protect participants and beneficiaries from individuals likely to harm them in the future. See *Martin* v. *Feilen*, 965 F.2d 660, 672-673 (8th Cir. 1992), cert. denied, 113 S. Ct. 979 (1993); *Beck* v. *Levering*, 947 F.2d 639, 641 (2d Cir. 1991), cert. denied, 112 S. Ct. 1937 (1992); see also *Ex parte Wall*, 107 U.S. 265, 288 (1883) (attorney disbarment proceeding "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them").[8]

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the Plans by the sums recovered by the private plaintiffs"), cert. denied, 112 S. Ct. 1937 (1992).

[8] Courts have uniformly held that a civil debarment order following a criminal conviction does not violate double jeopardy. *See, e.g., United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992) (prohibition against trading on commodities markets); *Manocchio* v. *Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (exclusion of physician from Medicare participation); *United States* v. *Reed*, 937 F.2d 575 (11th Cir. 1991) (arbitral suspension from employment); *United States* v. *Bizzell*, 921 F.2d 263 (10th Cir. 1990) (exclusion from participation in HUD programs); *United States* v. *Naftalin*, 606 F.2d 809 (8th Cir. 1979) (prohibition against securities investment activities).

Nor is relief under Section 409 dependent upon a prior criminal conviction. Thus, contrary to petitioner's argument (Pet. 27-28), the 13-year, automatic debarment resulting from and dependent on his criminal conviction under Section 411, see 29 U.S.C. 1111, does not alter the remedial nature of the injunction at issue here; it merely underscores the need for the additional protection that a permanent injunction, enforceable through contempt proceedings, will provide.[9] Petitioner, like the permanently enjoined fiduciaries in *Beck* v. *Levering*, 947 F.2d at 641, engaged in "egregious self-dealing." Concrete proof of future wrongdoing is not required (see Pet. 28) because petitioner must not "be allowed to loot a second [company's] pension plan[s] before an injunction may be issued." *Beck*, 947 F.2d at 641.[10]

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[9] Petitioner argues (Pet. 28) that "[t]he immediate imposition of the debarment period specified in § 1111 without reference to an appeal of the criminal conviction stated a legislative decision as to the appropriate debarment period necessary to protect the interests with which the Government is concerned in this type of situation." Although petitioner frames this as a Double Jeopardy argument, it is in substance a statutory challenge: petitioner contends that the mandatory 13-year debarment specified in 29 U.S.C. 1111 implicitly limits the district court's authority to award appropriate equitable relief pursuant to 29 U.S.C. 1109(a). Petitioner cites no authority for that proposition, and we are aware of none.

[10] There is also no merit to petitioner's contention (Pet. 28-36) that the Double Jeopardy Clause's ban on "successive prosecutions" for the same offense bars a civil proceeding following a criminal trial for the same conduct. A civil proceeding is not a "prosecution" that adjudicates guilt or innocence, which can thereby subject a defendant to double jeopardy under a successive prosecutions analysis. See, *e.g.*, *Lockett* v. *Montemango*, 784 F.2d 78 (2d Cir.), cert. denied, 479 U.S. 832

2. Petitioner's subsidiary contentions (Pet. 36-53) do not warrant this Court's review. First, petitioner argues (Pet. 41) that the PBGC had exclusive authority to sue him for his ERISA violations once it became trustee pursuant to statute. That contention is meritless because, as the district court recognized, the plain language of Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. 1132(a)(2) and (5), authorizes the Secretary to sue. The PBGC is a wholly owned government corporation established to administer the pension plan termination insurance program created by Title IV of the ERISA. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 636-637 (1990). The PBGC ordinarily does not have authority to bring an action against fiduciaries, because Section 502 does not list the PBGC as a party entitled to sue to redress fiduciary breaches. The PBGC obtained authority to sue when it terminated and became trustee of the plans at issue

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(1986); *United States ex rel. Fulton* v. *Franzen*, 659 F.2d 741, 743 (7th Cir. 1981), cert. denied, 455 U.S. 817 (1982); *United States* v. *Lasky*, 600 F.2d 765, 767 n.1 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *MacDonald*, 585 F.2d 1211, 1212 (4th Cir. 1978), cert. denied, 440 U.S. 961 (1979). Indeed, it is well settled that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (citing *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938)). Civil proceedings therefore routinely follow criminal prosecutions without implicating any double jeopardy concerns. See, *e.g.*, *United States* v. *Furlett*, *supra*; *Manocchio* v. *Kusserow*, *supra*; *United States* v. *Reed*, *supra*; *United States* v. *Bizzell*, *supra*. Indeed, 18 U.S.C. 3663(e)(2), which provides that restitution paid as part of a criminal sentence shall be set off against a later civil damages award, quite plainly contemplates the prospect of successive criminal and civil proceedings based upon the same wrongful conduct.

in this case pursuant to Section 4042(d)(1)(B)(iv) of ERISA, 29 U.S.C. 1342(d)(1)(B)(iv). See *PBGC* v. *Scherling*, 905 F.2d 173, 175-176 (8th Cir. 1990). That provision, however, does not purport to give the PBGC exclusive authority to sue, or to divest the Secretary of his authority under Sections 502(a)(2) and (5). See *Dole* v. *Lundberg*, 12 Employee Benefits Cas. (BNA) 1941, 1943 n.1 (N.D. Tex. 1990) (Secretary and PBGC both may sue to redress fiduciary breaches).[11]

Petitioner also contends (Pet. 42-53) that the court of appeals erroneously concluded that the Department of Labor is immune from suit under RICO and that it complied with the Right to Financial Privacy Act during its investigation of his activities. As an initial matter, it is not clear that the court of appeals actually addressed those issues. As discussed above, the district court decided these issues in non-final orders issued in April 1992. Petitioner sought to appeal those issues after the district court certified

[11] There is no merit to petitioner's contention (Pet. 40) that under Section 4042(f) of ERISA, 29 U.S.C. 1342(f), the proceedings in this case were automatically stayed when the PBGC became trustee. No application was made to any court "for the appointment of a trustee or the issuance of a decree" under Section 4042, as is required to trigger a stay under subsection (f). Moreover, the Secretary sued petitioner in his capacity as a fiduciary, and such suits are not among those subject to a stay under Section 4042(f). Petitioner's argument (Pet. 40-41), not raised below, that the Secretary is not the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure, also has no basis. Rule 17(a) specifically empowers "a party authorized by statute" to maintain an action in his own name, and there can be no doubt that the Secretary is such a party under Section 502(a) of ERISA. See *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 694 (7th Cir. 1986) (en banc).

its October 1992 order granting summary judgment to the Secretary on Count 6 of his amended complaint, rather than wait until the court disposed of the remaining issues in the case in February 1993. The court of appeals' one-word affirmance does not say whether it rejected petitioner's RICO and financial privacy arguments on the merits or concluded that it lacked jurisdiction to entertain them.

In any event, petitioner's arguments are meritless. It is well established that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity "must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); accord, *United States* v. *Idaho ex rel. Director, Dep't of Water Resources*, 113 S. Ct. 1893, 1896 (1993). As the lower courts have uniformly held, there is no such unequivocal expression of congressional intent to subject the federal government to liability under RICO. See *McNeily* v. *United States*, 6 F.3d 343, 350 (5th Cir. 1993); *Berger* v. *Pierce*, 933 F.2d 393, 397 (6th Cir. 1991); *United States* v. *Bonanno Org. Crime Family*, 879 F.2d 20, 23 (2d Cir. 1989); *Ungaro* v. *Desert Palace, Inc.*, 91-1 U.S. Tax Cas. (CCH) ¶ 50,294, at 88,171 (D. Nev. 1989); *Owen* v. *Resolution Trust Corp.*, 766 F. Supp. 1163, 1166 (S.D. Fla. 1991); *Wiley* v. *Federal Land Bank*, 657 F. Supp. 964 (S.D. Ind. 1987).[12] Indeed, the terms

[12] Petitioner erroneously cites cases (Pet. 44-45) for the proposition that state and local governments are subject to suit under RICO. Those cases hold only that employees of a state or local government can use public office as an "enterprise" that subjects the employees to RICO liability. Courts have held that

of the statute preclude such liability, since the government cannot engage in the "racketeering activity," see 18 U.S.C. 1962, required for a civil RICO action. See 18 U.S.C. 1961(1) (Supp. IV 1992) (racketeering activity requires that acts be "chargeable," "indictable," or "punishable" under various state and federal criminal provisions); *McNeily*, 6 F.3d at 350; *Berger*, 933 F.2d at 397.[13]

Petitioner attempts to avoid these precedents by arguing (Pet. 43) that his RICO claim is a compulsory counterclaim and that even if the government is generally immune from suit under RICO it has waived its immunity with respect to compulsory counterclaims. Whether or not the government waives immunity with respect to compulsory counterclaims is immaterial, however, because petitioner has not asserted such claims here. Courts have concluded that the government waives its immunity only "as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim." *Frederick* v. *United States*, 386 F.2d 481, 488 (5th Cir. 1967). In

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RICO does not subject state and local governments themselves to civil liability. See, *e.g.*, *Lancaster Community Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404-405 (9th Cir. 1991), cert. denied, 112 S. Ct. 1168 (1992); *Genty* v. *Resolution Trust Corp.*, 937 F.2d 899, 906-914 (3d Cir. 1991); *Biondolillo* v. *City of Sunrise*, 736 F. Supp. 258 (S.D. Fla. 1990).

[13] Whether or not RICO requires that the defendant, or defendant's acts, be culpable (see Pet. 45-46), is therefore of no moment, since "it is self-evident that a federal agency is not subject to state or federal criminal prosecution." *Berger*, 933 F.2d at 397.

this case, the complaint and counterclaim do not involve the same transaction or occurrence. The government's suit alleged fiduciary misconduct with respect to the plans between 1984 and 1988, while the counterclaim concerned the Department's 1990-1991 investigation of petitioner, and its purported use of financial records. See pp. 3-4, *supra*. Thus, the two actions have only a "tenuous and indirect" connection to each other. *EEOC* v. *First Nat'l Bank of Jackson*, 614 F.2d 1004, 1008 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1981). In addition, while the Secretary sought disgorgement of profits and a permanent injunction for petitioner's fiduciary breaches, the counterclaim sought compensatory and treble damages for alleged misuse of financial records. For this reason as well, the counterclaim did not assert matters "to the extent of defeating the government's claim." See *Frederick*, 386 F.2d at 488.[14]

Finally, the district court correctly determined that the government did not violate the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* The RFPA protects against a bank's unauthorized disclosure to the government of a customer's financial records, see 12 U.S.C. 3402, but courts have uniformly recognized that it does not shield from disclosure the records pertaining to a pension plan, or information derived from such records. See *Donovan* v. *National Bank of Alaska*, 696 F.2d 678, 683 (9th Cir. 1983); *Dole* v. *Pittsburgh Nat'l Bank*, 11 Employee Benefits Cas. (BNA) 1182, 1183 (W.D. Pa. 1989);

[14] There is no merit to petitioner's contention (Pet. 46) that the Secretary raised for the first time on appeal the fact that the counterclaim failed to state a claim under RICO. See R2-86; R2-87.

Schwab v. *United States Dep't of Labor*, 12 Employee Benefits Cas. (BNA) 2190, 2192 (W.D. Mo. 1990); Mem. Op. 1-3 (Apr. 22, 1992). The district court correctly applied those principles in determining that the Department of Labor did not violate petitioner's financial privacy because it obtained plan records rather than any of petitioner's personal records.

Petitioner does not challenge the foregoing principles, but instead argues (Pet. 48-52) that the district court misapplied them. That contention is meritless and in any event presents a purely factual issue that does not warrant this Court's review.[15] Relying on a district court decision that granted a preliminary injunction requiring future compliance with the RFPA, see Pet. 52 (citing *Hunt* v. *SEC*, 520 F. Supp. 580 (N.D. Tex. 1981)), petitioner also argues that the RFPA allows the suppression of records obtained in violation of the Act. The district court correctly held that the RFPA does not authorize that remedy. See, *e.g.*, *United States* v. *Davis*, 953 F.2d 1482, 1496 (10th

[15] Contrary to petitioner's assertion (Pet. 48), the Secretary submitted undisputed evidence to the district court that all of the documents alleged to have come from petitioner's personal banking records came instead from sources such as public files, and the plans' own bank records. See *Donovan* v. *National Bank of Alaska*, *supra*; *Dole* v. *Pittsburgh Nat'l Bank*, *supra*. Similarly, petitioner cannot now rely (Pet. 50-51) upon a check written to the plans for his purchase of stock on behalf of Lattimer-Stevens, for his claim that the government violated the RFPA. *Donovan* v. *National Bank of Alaska*, *supra*; *Schwab* v. *United States Dep't of Labor*, *supra*. Moreover, petitioner has never pointed to any documents allegedly obtained in violation of the RFPA during the government's criminal investigation, and the notes to which he now points (Pet. 49-50) contain information relating to bank loans involving the plans.

Cir.), cert. denied, 112 S. Ct. 2286 (1992); *United States* v. *Kington*, 801 F.2d 733, 738 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987); *United States* v. *Frazin*, 780 F.2d 1461, 1466 (9th Cir.), cert. denied, 479 U.S. 844 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1994